Supreme Court, U.S.
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No. 08-659

In The
Supreme Court of the United States

CARLOS COY,

Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit, distinguishing itself from the other circuit courts, continues to refuse to apply correctly this Court's standard governing motions for a certificate of appealability—*see Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Banks v. Dretke*, 540 U.S. 668 (2004); and *Tennard v. Dretke*, 542 U.S. 274 (2004)—by failing to analyze whether petitioner's habeas claim is debatable among jurists of reason, whether a court could resolve the issue in a different manner, and whether the issue is adequate to deserve encouragement to proceed further.

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PETITION FOR A WRIT OF CERTIORARI

Carlos Coy respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The findings of fact and conclusions of law of the 351st District Court of Harris County, Texas, (Appendix E) are not reported. The Order of the Texas Court of Criminal Appeals denying habeas corpus relief (Appendix D) is not reported. The Memorandum and Order (Appendix B) and the Final Judgment (Appendix C) of the United States District Court are not reported. The Order of the Fifth Circuit denying a certificate of appealability (Appendix A) is not reported.

JURISDICTION

The Fifth Circuit denied a certificate of appealability on August 19, 2008. This petition is being filed within 90 days of that decision. This Court has jurisdiction under 28 U.S.C. § 1254(1). Petitioner initially invoked federal jurisdiction under 28 U.S.C. § 2254(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deprive any person of liberty . . . without due process of law. . . ."

STATUTORY PROVISION

Title 28, section 2253(c)(2) of the United States Code provides, in pertinent part, "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

A. Summary Of The Issue

This case offers the Court an opportunity to clarify the proper application of § 2253(c) of the Antiterrorism and Effective Death Penalty Act, which bars appeal from a final order in a habeas corpus proceeding unless the district judge or a circuit judge issues a certificate of appealability (COA). A COA may issue only if the petitioner has made "a substantial showing of the denial of a constitutional right." 28

U.S.C. § 2253(c)(2). This Court has interpreted that language to mean that the issues are debatable among jurists of reason, that a court could resolve the issues in a different manner, and that the issues are adequate to deserve encouragement to proceed further. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

Adjudication under a relatively open-ended standard like § 2253(c) will rarely yield an overt "split" among the circuit courts as a matter of law. Nonetheless, application of the COA standard may yield divergent tendencies in different jurisdictions, and in such instances this Court has intervened to clarify the proper application of the standard. Three times since 2003, this Court has reversed efforts by the Fifth Circuit to narrow drastically the range of cases in which a COA may issue. *See Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Banks v. Dretke*, 540 U.S. 668 (2004); *Tennard v. Dretke*, 542 U.S. 274 (2004). In *Tennard*, for example, this Court chastised the Fifth Circuit for "paying lipservice to the principles guiding issuance of a COA." 542 U.S. at 283. The present case is the latest in a series of episodes in which the Fifth Circuit has resisted this Court's balanced interpretation of § 2253(c).

As the present case demonstrates, the Fifth Circuit continues to deviate from this Court's instructions in two respects. First, it seeks to avoid the implications of *Miller-El* and similar decisions by issuing a three-paragraph, boilerplate, form order that summarily denies a COA without explaining why

the claim is not debatable among jurists of reason, why a court could not resolve the issue in a different manner, and why the issue is not adequate to deserve encouragement to proceed further. Second, its rejection of petitioner's claim indicates that the Fifth Circuit continues to use COA determinations as an opportunity to decide the *merits* of the appeal, not simply to determine whether the claim is fairly debatable. In so doing, the Fifth Circuit ignores this Court's clear command in *Miller-El*.

Petitioner filed a federal habeas corpus petition alleging that he was denied the effective assistance of counsel at the guilt-innocence stage based on nine instances of deficient performance.[1] The District Court uncritically accepted the state court fact findings, which the record does not support, and deferred to legal conclusions that are not entitled to deference. The District Court's methodology insulated unsound claims of trial strategy from federal review and constitute an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Rompilla v. Beard*, 545 U.S. 966 (2005).

The state court had adopted verbatim the findings and conclusions authored by the habeas prosecutor. The findings disingenuously cite portions of trial counsel's testimony out of context to support the

[1] Petitioner urged only eight of these allegations of deficient performance in the Fifth Circuit.

State's position and ignore the testimony and the caselaw that support petitioner's position. In one instance, the court found that petitioner failed to prove that the jury believed the complainant's mother about a particular matter without acknowledging that Texas Rule of Evidence 606(b), like its federal counterpart, precludes a party from presenting testimony or affidavits from jurors regarding what they believed.[2]

Counsel's performance is measured against an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688. "Prevailing norms of practice as reflected in the American Bar Association standards and the like . . . are guides to what is reasonable." *Wiggins*, 539 U.S. at 522.

Petitioner has the burden to overcome the presumption that counsel's challenged conduct was strategic. *Bell v. Cone*, 535 U.S. 685, 698 (2002). Whether conduct was strategic is a question of fact; whether that strategy was objectively reasonable is a question of law that is reviewed *de novo*. *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991).

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[2] The state court recognized this rule of evidence when it sustained petitioner's objection to the State's attempt to elicit what the jurors told counsel after the trial (2 S.H.R.R. 57). Nonetheless, it inexplicably adopted a finding that petitioner failed to prove what the jury believed.

The District Court uncritically accepted the state court findings and conclusions that counsel's explanations for his challenged conduct were reasonable, in conflict with Supreme Court precedent that strategic choices are entitled to deference only if they are based on informed decisions. *Strickland*, 466 U.S. at 690-691. The principal concern is not whether counsel's conduct was strategic but whether the investigation supporting his conduct was itself reasonable. A cursory investigation does not automatically justify a tactical decision. *Wiggins*, 539 U.S. at 527. "It is axiomatic—particularly since *Wiggins*—that such a decision cannot be credited as calculated tactics or strategy unless it is grounded in sufficient facts, resulting in turn from an investigation that is at least adequate for that purpose." *Lewis v. Dretke*, 355 F.3d 364, 368 (5th Cir. 2003).

There is a crucial distinction between strategic judgments and omissions. *Loyd v. Whitley*, 977 F.2d 149, 158 (5th Cir. 1992). A strategy based on counsel's failure to fully investigate the facts or his misunderstanding of the applicable law is not objectively reasonable. *Moore v. Johnson*, 194 F.3d 586, 610 (5th Cir. 1999). "The Court is . . . not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all." *Id.* at 604.

The District Court's uncritical acceptance of the state court findings and conclusions effectively insulated counsel's claims of strategy from federal review and constitute an unreasonable application of *Strickland*, *Wiggins*, and *Rompilla*. A COA should have issued because this issue is debatable among jurists of reason. The Fifth Circuit erred in denying a COA and in continuing to refuse to apply this Court's standard of review correctly. The Fifth Circuit's repeated disregard for this Court's standard constitutes an unacceptable departure from the usual course of judicial proceedings and conflicts with relevant decisions of this Court. Accordingly, this Court should exercise its supervisory powers and grant certiorari.

B. Procedural History

Petitioner was indicted for aggravated sexual assault in cause number 908426 in the 351st District Court of Harris County, Texas. He pled not guilty. A jury convicted him and assessed his punishment at 45 years and a $10,000 fine on May 30, 2002. The First Court of Appeals of Texas affirmed the conviction in an unpublished opinion issued on November 6, 2003. The Court of Criminal Appeals refused discretionary review on June 30, 2004. *Coy v. State*, No. 01-02-593-CR (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

Petitioner filed a state habeas corpus application on September 14, 2005, and filed an amended application on August 2, 2006. The trial court conducted

an evidentiary hearing and signed the State's proposed findings of fact and conclusions of law recommending that relief be denied. The Court of Criminal Appeals denied relief without written order on January 17, 2007. *Ex parte Coy*, No. WR-65,301 (Tex. Crim. App. 2007).

Petitioner filed a federal habeas corpus petition on January 19, 2007. The District Court granted summary judgment, dismissed the petition, and denied a COA on June 13, 2007.

Petitioner filed a motion for a COA in the Fifth Circuit on July 20, 2007, which was denied on August 19, 2008.

REASON FOR GRANTING THE PETITION

THE FIFTH CIRCUIT ERRED IN CONTINUING TO REFUSE TO APPLY CORRECTLY THIS COURT'S STANDARD GOVERNING MOTIONS FOR A CERTIFICATE OF APPEALABILITY BY FAILING TO ANALYZE WHETHER PETITIONER'S HABEAS CLAIM IS DEBATABLE AMONG JURISTS OF REASON, WHETHER A COURT COULD RESOLVE THE ISSUE IN A DIFFERENT MANNER, AND WHETHER THE ISSUE IS ADEQUATE TO DESERVE ENCOURAGEMENT TO PROCEED FURTHER.

A. The Background

The indictment alleged that petitioner caused the complainant's sexual organ to contact his mouth (C.R. 2). The complainant, age nine, testified that she went to petitioner's home to spend the night with his daughter, Carly, on the night of September 1, 2001 (10 R.R. 53, 56-62; 11 R.R. 45-46). The girls got in Carly's bed, and Carly fell asleep (11 R.R. 72, 76, 80). Petitioner entered the bedroom and rubbed the complainant's private part; when she turned over on her stomach, he rubbed her buttocks (11 R.R. 80-87). He left the room, returned minutes later, and rubbed and licked her private part (11 R.R. 87-90).

The next morning, the complainant told her mother, Maryvel Ramirez, that petitioner touched her "down there" and pointed to her private part (10 R.R.

70-71; 11 R.R. 107). Ramirez testified that the complainant said that it happened while she was asleep (10 R.R. 72-73). The complainant testified that she was sleepy at the time, did not know whether she had a dream, and "wasn't sure what happened" (11 R.R. 109).[3] Ramirez's sister called the police that night (10 R.R. 79-81, 84, 171, 181). An officer arrived, took a report, and advised Ramirez to take the complainant to a doctor as soon as possible (10 R.R. 190-200).

The complainant told a nurse the next morning only that she had been touched (11 R.R. 120). Ramirez told the nurse that she was "not sure if any penetration or if any assault actually occurred" (12 R.R. 75). A doctor examined the complainant and found no physical indications of sexual abuse (12 R.R. 107-08).

When interviewed by a juvenile sex crimes detective on September 10, 2001, the complainant said for the first time that petitioner had licked her (10 R.R. 96; 11 R.R. 112-13, 158, 167-68).

Susan Szczygielski, a therapist, testified for the prosecution that the complainant exhibited symptoms that were consistent with sexual abuse (13 R.R. 55-56), but acknowledged that there could be other sources for these symptoms (13 R.R. 77, 80-82, 84), such as a dream (13 R.R. 104-05). However, the

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[3] The complainant reiterated on cross-examination that she was not sure what happened and thought that she might have been dreaming (11 R.R. 131). The prosecutor elicited on redirect examination that the incident "really happened" (11 R.R. 141).

complainant had to be exposed to graphic sexual stimulation in order to have such a dream (13 R.R. 106).

The State stipulated that, prior to September 1, 2001, the complainant had seen several movies that contained sexually explicit scenes, including a man performing oral sex on a woman; the jury watched these movies (15 R.R. 21, 102-03; 16 R.R. 4-5; 17 R.R. 73).

The State argued that the complainant's testimony about the sexual assault was uncontradicted and that she could not have fooled everyone about the incident (17 R.R. 47, 52-53, 55). The defense argued that the complainant had been exposed to sexually explicit movies, that she was not sure what happened, and that she might have been dreaming (17 R.R. 66, 70, 73). The jury convicted petitioner.

Petitioner alleged in the state habeas corpus proceeding that he was denied the effective assistance of counsel at the guilt-innocence stage because:

1. counsel failed to object to references to the complainant as the "victim" during the opening statement, testimony, and summation;

2. counsel failed to file a motion in limine and object to lay and expert opinion testimony that, in essence, the complainant was telling the truth about the sexual assault;

3. counsel failed to ask the complainant's mother about whether she intended to file a civil lawsuit against petitioner;

4. counsel failed to object and opened the door to police opinion testimony that petitioner was grooming his daughter for future sexual assaults;

5. counsel opened the door to testimony that petitioner beat women and used drugs;

6. counsel failed to file a motion in limine and object to testimony that the name of petitioner's record company is Dope House Records;

7. counsel failed to object to testimony that the complainant's grandfather, on being told by his wife that petitioner molested the complainant, said that he could not take it and died of a heart attack the next day;

8. counsel failed to object to argument that the complainant's testimony regarding the elements of the offense was uncontradicted; and

9. counsel invited and failed to properly object to argument attacking him for trying to hide the truth and keep petitioner out of jail for a fee.

The state habeas court conducted an evidentiary hearing and found that lead trial counsel decided to limit his objections in order to "establish credibility

with the jury." This finding constituted an unreasonable determination of the facts in light of the evidence presented. The record reflects that, during five days of testimony and argument at the guilt-innocence stage, counsel made 86 objections and asked to approach the bench eight times in the presence of the jury. Furthermore, this finding was gratuitous, as counsel ultimately acknowledged that it was his strategy not to make *frivolous* objections and that petitioner's allegations of deficient performance do not concern frivolous matters (3 S.H.R.R. 82-88). Finally, assuming *arguendo* that counsel's failure to object was strategic, it was unsound strategy not to object to inadmissible, prejudicial testimony. *See Lyons v. McCotter*, 770 F.2d 529, 534 (5th Cir. 1985).

The state habeas court also found that counsel decided to limit his objections because of the judge's demeanor in reacting to them. This finding constituted an unreasonable determination of the facts in light of the evidence presented. Counsel denied at the evidentiary hearing that the judge's demeanor was the reason that he did not object to the matters in question (1 S.H.R.R. 27). Furthermore, it is an unreasonable strategy not to object to inadmissible, prejudicial testimony based on counsel's perception that the judge will react unfavorably. Competent counsel would address any concerns regarding the judge's demeanor at a hearing outside the presence of the jury, have the record reflect any inappropriate demeanor, and object to it as an improper comment on the weight of the evidence; he would not remain

silent while the State offered inadmissible, prejudicial testimony because he feared that the judge would react unfavorably if he objected.

The Texas Court of Criminal Appeals denied relief without written order based on these findings and conclusions.

Petitioner contended in the federal habeas corpus proceeding that the state court decision that counsel was not ineffective constituted an unreasonable determination of the facts in light of the evidence presented and an unreasonable application of clearly established precedent from this Court. 28 U.S.C. § 2254(d). The District Court uncritically accepted the state court fact findings, which the record does not support, and deferred to legal conclusions that are not entitled to deference. It denied relief and a COA.

A COA should have issued, and the state court decision should be overturned, because reasonable jurists could differ as to whether the state court determinations of fact are "objectively unreasonable in the light of the evidence presented in the state court proceeding." *Miller-El*, 537 U.S. at 340. Deference to state court findings does not imply abandonment or abdication of judicial review. *Id.* A federal court can disagree with a state court's credibility determination and, when guided by the AEDPA, conclude that the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence. *Id.; see Norton v. Spencer*, 351 F.3d 1 (1st Cir. 2003) (state court findings disbelieving

affidavits recanting sexual assault allegations were unreasonable); *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004) (state court findings that defendant's confession was voluntary were unreasonable); *Guidry v. Dretke*, 397 F.3d 306 (5th Cir. 2005) (district court properly rejected state court findings that defendant did not request counsel before interrogation and that detectives did not lie to him that counsel authorized him to speak with them). The trial record and the habeas record from the state court evidentiary hearing do not support the state court fact findings.

Petitioner requested the issuance of a COA from the Fifth Circuit on the issue of whether the district court erred in concluding that the state court reasonably applied this Court's precedent in holding that counsel was effective. A circuit judge issued a three-paragraph order denying a COA. The first paragraph identified the offense of conviction and the nature of the habeas claim. The second paragraph announced the standard of review, citing 28 U.S.C. § 2253(c)(2) and *Slack*. The third paragraph contained the sum of the analysis: "Coy has failed to make the requisite showing. Accordingly, the motion for a COA is DENIED." Importantly, the order did not address whether the habeas claim is debatable among jurists of reason, whether a court could resolve the issue in a different manner, and whether the issue is adequate to deserve encouragement to proceed further.

B. The COA Standard Of Review

An appeal from a district court's denial of a petition for a writ of habeas corpus where the petitioner's confinement results from a state court process requires that a district or circuit judge issue a COA. 28 U.S.C. § 2253(c)(1). A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). A "substantial showing" means that the issues are debatable among jurists of reason, that a court could resolve the issues in a different manner, and that the issues are adequate to deserve encouragement to proceed further. *Slack*, 529 U.S. at 483-84; *see also Barefoot v. Estelle*, 463 U.S. 880, 893, and n. 4 (1983) (announcing pre-AEDPA standard for issuance of certificate of probable cause, which Congress codified in 28 U.S.C. § 2253(c)).

This Court clearly articulated and reinforced the COA standard in *Miller-El*. The COA determination requires an overview of the claims in the habeas petition, a general assessment of their merits, and an examination of the District Court's application of the AEDPA to the claims; but the petitioner need not show that the appeal will succeed. 537 U.S. at 336-37. A "court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 337. Although a COA should not issue as a matter of course, a petitioner should receive the benefit of "close calls," as it is "consistent with § 2253 that a COA will issue in some instances where there is no

certainty of ultimate relief." *Id.* A petitioner does not even have to prove that some jurists would grant habeas relief. *Id.* at 338. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case received full consideration, that petitioner will not prevail." *Id.*

C. The Fifth Circuit Continuously Refuses To Apply The COA Standard Correctly.

The Fifth Circuit incorrectly applied the standard governing the issuance of a COA because it did not even generally assess the merits of petitioner's claim and examine the District Court's application of the AEDPA to the claim. Reasonable jurists could debate whether the state court decision that counsel was not ineffective was based on an unreasonable determination of the facts in light of the evidence presented or an unreasonable application of this Court's precedent. Neither the District Court nor the Fifth Circuit fully considered the substantial evidence developed at the evidentiary hearing in support of the claim. Both denied a COA without explanation.

Petitioner's case is worthy of certiorari review because it demonstrates that the Fifth Circuit continues to apply incorrectly this Court's standard governing the issuance of a COA. This Court has not had to reverse any other circuit court for failing to apply this standard correctly, but on three recent occasions it has reversed the Fifth Circuit for failing

to do so. In addition to *Miller-El*, this Court reversed the Fifth Circuit for denying a COA in *Banks v. Dretke*, 540 U.S. 668 (2004), and *Tennard v. Dretke*, 542 U.S. 274 (2004).[4] Indeed, in *Tennard*, this Court chastised the Fifth Circuit for "paying lipservice to the principles guiding issuance of a COA." 542 U.S. at 283.

Apparently in response to these reversals, the Fifth Circuit issues boilerplate, form orders that summarily deny COA without explaining why the claim is not debatable among jurists of reason, why a court could not resolve the issue in a different manner, and why the issue is not adequate to deserve encouragement to proceed further. The Fifth Circuit arguably withholds its reasoning for denying COA to immunize its orders from certiorari review.[5] Such cursory consideration of constitutional claims cannot be adequate to meet the standard imposed by this Court.

This case is exceptional because of the criminal justice system's willingness to ignore overwhelming

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[4] In *Banks*, this Court held that the Fifth Circuit erred in denying a COA on whether Federal Rule of Civil Procedure 15(b) extends to habeas corpus proceedings. In *Tennard*, it held that the Fifth Circuit erred in denying a COA on whether the Texas capital sentencing scheme provides a constitutionally adequate means of presenting evidence of a defendant's low IQ in mitigation of punishment.

[5] Miller-El probably would have been executed had the Fifth Circuit issued such an order in his case.

evidence that experienced sex crimes prosecutors took advantage of a defense lawyer who was in over his head in a serious felony trial. Neither the District Court nor the Fifth Circuit gave full consideration to the substantial evidence petitioner developed at the evidentiary hearing that supports his claim and the caselaw from this Court that undermines the conclusion that counsel was effective. At a minimum, reasonable jurists could differ on the question of whether the state court decision that counsel was effective was unreasonable, and a COA should have issued. This Court should exercise its supervisory powers and grant certiorari because the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings and decided this case in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(a) and (c).

CONCLUSION

This Court should conclude that a COA should have issued, summarily reverse the judgment of the Fifth Circuit, and remand for consideration of the merits of the appeal.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20489
USDC No. 4:07-CV-302

CARLOS COY

Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court for the Southern District of Texas

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(Filed Aug. 19, 2008)

ORDER:

Carlos Coy, Texas prisoner # 1110642, seeks a certificate of appealability (COA) to appeal the denial of the 28 U.S.C. § 2254 application challenging his conviction for aggravated sexual assault of a child. He asserts eight claims of ineffective assistance of trial counsel.

A COA may issue if Coy "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court rejected his claims on the merits, he must show that jurists of reason "would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Coy has failed to make the requisite showing. Accordingly, the motion for a COA is DENIED.

/s/ Edith Brown Clement
EDITH BROWN CLEMENT
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARLOS COY, TDCJ-CID NO. 1110642, Petitioner, v. NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § § § § § § § § § §	CIVIL ACTION NO. H-07-0302 (Filed Jun. 13, 2007)

MEMORANDUM OPINION AND ORDER

Petitioner, Carlos Coy, is a person in state custody who brings this action seeking a Writ of Habeas Corpus (Docket Entry No. 1). Pending before the court is Respondent Nathaniel Quarterman's Motion for Summary Judgment with Brief in Support (Docket Entry No. 8). For the reasons stated below, respondent's motion will be granted, and Coy's Petition for a Writ of Habeas Corpus of a Person in State Custody will be dismissed.

I. Background

The facts of Coy's crime were summarized by the First Court of Appeals as follows:

> In September 2001, the then nine-year-old complainant told her mother about sexual acts [Coy] had performed on her. The mother took her daughter to the authorities, who began an investigation of the complainant's allegations. The evidence at trial showed that [Coy]'s daughter had invited the complainant to spend the night at [Coy]'s home on September 1, 2001. Both children were watching television in [Coy]'s bedroom when [Coy] entered the room and began watching television with the children. While sitting on the bed, [Coy] inappropriately touched and rubbed [the complainant]. After this incident, the complainant left [Coy]'s bedroom.
>
> The children eventually entered the daughter's bedroom. Both children climbed into bed and began watching television. After [Coy]'s daughter fell asleep, [Coy] entered the room, sat on the bed, reached under the covers, and again inappropriately touched her. Eventually, [Coy] sexually assaulted the complainant by causing her sexual organ to come into contact with his mouth. The complainant testified that [Coy] persisted in this conduct for approximately one minute.
>
> The complainant did not, after this incident, stay overnight at [Coy]'s home as planned, but returned home. The following

> morning, she informed her mother what occurred at [Coy]'s home, and the authorities were contacted to investigate the incident.[1]

On May 30, 2002, a jury convicted Coy of aggravated sexual assault and sentenced him to forty-five years' imprisonment and a $10,000 fine.[2] His conviction was affirmed on direct appeal on November 6, 2003, and his petition for discretionary review was refused on June 30, 2004.[3] On September 14, 2005, Coy filed his first state habeas petition arguing that his attorney provided ineffective assistance at trial.[4] This petition was dismissed for failure to comply with the Texas Rules of Appellate Procedure on July 26, 2006.[5] Coy then filed a second state habeas petition, which also argued ineffective assistance at trial.[6] The trial court held a hearing, entered 30 pages of findings of fact and conclusions of law, and recommended that petitioner's applications be denied.[7] The Texas

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[1] *Coy v. State*, No. 01-02-00593-CR (Tex. App. – Houston [1st Dist.] Nov. 6, 2003, pet. ref'd) (unpublished), attached to *Ex parte Coy*, Appl. No. WR-65,301-01, pp. 54-55.

[2] *Ex parte Coy*, Appl. No. WR-65,301-01, p. 2.

[3] *Coy v. State*, No. 01-02-00593-CR (Tex. App. – Houston [1st Dist.] Nov.6, 2003, pet. ref'd) (unpublished); *Coy v. State*, PDR No.1969-03.

[4] *Ex parte Coy*, Appl. No. WR-65,301-01, pp. 8-10.

[5] *Ex parte Coy*, Appl. No. 65,301-01, at cover.

[6] *Ex parte Coy*, Appl. No. 65,301-02, pp. 7-8,

[7] *Ex parte Coy*, Appl. No. 65,301-01, pp. 220-25.

Court of Criminal Appeals denied habeas relief without written order on January 17, 2007.[8]

Coy filed an application for a writ of habeas corpus in this court on January 19, 2007.[9] On April 5, 2007, respondent filed the pending motion for summary judgment (Docket Entry No. 8). Coy filed his response to the motion for summary judgment on April 20, 2007 (Docket Entry No. 10).

II. Standards of Review

A. Habeas Corpus

A court cannot grant a writ of habeas corpus with respect to any claim that was adjudicated on the merits in state court unless the state court decision

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Courts review pure questions of law and mixed questions of law and fact under

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[8] *Ex parte Coy*, Appl. No. 65,301-02, at cover.

[9] Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1.

subsection (d)(1) and questions of fact under subsection (d)(2). *Martin v. Cain*, 246 F.3d 471, 475 (5th Cir. 2001). A decision is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 120 S. Ct. 1495, 1523 (2000). A decision is an "unreasonable application" of federal law "if the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case." *Id.* The court "cannot reverse the denial of habeas relief simply by concluding that the state court decision applied clearly established federal law *erroneously*." *Martin*, 246 at 476 (citing *Williams*, 120 S. Ct. at 1521) (emphasis in original). "Determination of a factual issue made by a State court shall be presumed to be correct," and the prisoner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

B. Summary Judgment

Summary judgment is warranted when evidence reveals that no genuine dispute exists regarding any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552 (1986). The movant must inform the court of the basis for the summary judgment motion and must point to

relevant excerpts from pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of genuine factual issues. *Celotex Corp.*, 106 S. Ct. at 2553. In response to such a showing the nonmoving party must go beyond the pleadings and proffer evidence that establishes each of the challenged elements of the case, demonstrating the existence of genuine issues of material fact that must be resolved at trial. *Id.*

While "[a]s a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases," *Clark v. Johnson,* 202 F.3d 760, 764 (5th Cir. 2000), the rule applies only to the extent that it does not conflict with the habeas rules. *Smith v. Cockrell,* 311 F.3d 661, 668 (5th Cir. 2002), *overruled on other grounds by Tennard v. Dretke,* 124 S. Ct. 2562 (2004). Therefore, 28 U.S.C. § 2254(e)(1), which mandates that findings of fact made by a state court are "presumed to be correct," overrides the ordinary rule that in a summary judgment proceeding all disputed facts must be construed in the light most favorable to the nonmoving party. *Id.* Unless petitioner can rebut the presumption of correctness by clear and convincing evidence as to the state court's findings of fact, they must be accepted as correct." *Id.*

III. Analysis

As grounds for relief, Coy alleges that his trial counsel was unconstitutionally ineffective because

> 1. Counsel failed to object to references to the complainant as the "victim" during the opening statement, testimony, and summation;
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> 2. Counsel failed to file a motion in limine and object to lay and expert opinion testimony that, in essence, the complainant was telling the truth about the sexual assault;
>
> 3. Counsel failed to ask the complainant's mother about whether she intended to file a civil lawsuit against [Coy];
>
> 4. Counsel opened the door or failed to object to irrelevant, prejudicial testimony [that Coy was grooming his daughter for future sexual assaults, that Coy beat women and used drugs, and that the name of Coy's record company is "Dope House Records"];
>
> 5. Counsel failed to object to testimony that the complainant's grandfather, on being told by his wife that [Coy] molested the complainant, said that he could not take it and died of a heart attack the next day;
>
> 6. Counsel failed to object to argument that the complainant's testimony regarding the offense was uncontradicted; [and]
>
> 7. Counsel invited and failed to properly object to argument attacking him for trying to

> hide the truth and keep [Coy] out of jail for a fee.[10]

These are the same arguments Coy made in his state habeas applications.[11]

Under the standard established by *Strickland v. Washington,* 104 S. Ct. 2052, 2064 (1984), a defendant asserting ineffective assistance of counsel must first show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." The defendant must also show that "there was a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id.* at 2068. Both prongs of this test must be met to be entitled to habeas relief. With regard to the first prong, "[j]udicial scrutiny of counsel's performance must be highly deferential. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 2065 (internal quotations omitted). Regarding the second prong, a "mere possibility" that a different result might have

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[10] Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, pp. ii-iii.

[11] *Ex parte Coy*, Appl. No. WR-65,301-01; *Ex parte Coy*, Appl. No. WR-65,301-02.

occurred is not enough to demonstrate prejudice. *Lamb v. Johnson,* 179 F.3d 352, 359 (5th Cir. 1999).

Because Coy raised these claims in his state writ, which the Texas Court of Criminal Appeals denied (as opposed to dismissed), the Texas Court of Criminal Appeals' decision was "on the merits."[12] Therefore, this court cannot grant habeas relief absent a determination that the state court's denial of relief was contrary to, or involved an unreasonable application of, *Strickland* or unless the decision resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d). *See also Busby v. Dretke,* 359 F.3d 708, 717 (5th Cir. 2004)

With regard to the entire trial, the state habeas court found that Coy's attorney limited his objections in order to establish credibility with the jury, but still objected when he believed that it was necessary.[13] "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of

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[12] *See Ex parte Torres,* 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) ("In our writ jurisprudence, a 'denial' signifies that we addressed and rejected the merits of a particular claim while a 'dismissal' means that we decline[d] to consider the claim for reasons unrelated to the claim's merits.").

[13] *Ex parte Coy,* Appl. No. WR-65,301-01, pp. 221-22.

the evidence presented in the state-court proceeding, § 2254(d)(2)." *Miller-El v. Cockrell,* 123 S. Ct. 1029, 1041 (2003).

A. Referring to the Complainant as a "Victim"

Coy first argues that his trial attorney was ineffective because he failed to make running objections when the complainant, O.S., was referred to as a "victim" during the prosecutor's opening statement and by various witnesses.[14] Coy's counsel filed a motion in limine to preclude references to O.S. as a victim but the trial court overruled the motion.[15]

Coy argues that his trial counsel was constitutionally ineffective for failing to object when four witnesses referred to O.S. as a "victim."[16] The first instance of this reference took place during the examination of Officer David Milligan, the officer who took the initial crime report.[17] The following exchange occurred:

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[14] Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, pp. 9-11.

[15] Reporter's Record, Vol. 6, p. 22.

[16] Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, pp. 9-11.

[17] *Id.* at 9.

Q: Did you find out whether or not the victim was at the house?

A: Yes, she wasn't at the house.

Q: And were you told that the victim's name was [O.S.]?

A: Yes.

Q: Okay. Now, because the victim was not at the house, what did you do as a patrol officer? What is, I guess, your role at that point?

A: Well, even though the – the victim or complainant would not actually be present, I'm required to document my findings . . . [18]

Coy next points to the following exchange between the prosecutor and Detective Heidi Ruiz:

Q: And who did you speak with on the 7th?

A: On the 7th I spoke to Maryvel Ramirez, the mother of the complainant.

Q: The mother of the complainant?

A: Right.

Q: Okay. And what was the basis of the conversation you were having with her at the time? . . . Did you set up a time for

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[18] Reporter's Record, Volume 10, p. 193.

you to meet with her and with the victim in the case?

A: Yes, I did.

Q: And when was that?

A: We set up a time to meet with the victim, the victim's father and the victim's aunt on the 10th of September.[19]

Coy also argues that his trial attorney should have objected during the following exchange between the prosecutor and Nicoya McLemore, the complainant's teacher:

Q: Ms. McLemore, I want to direct your attention to the victim in this trial . . . Do you know [O.S.]?

A: Yes, I do.

Q: How do you know her?

A: She's a student in my class.

Q: And she's in your fourth grade class this year?

A: Yes.

Q: And you've had her as a student for how long?

A: This is my first year with her.

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[19] Reporter's Record, Volume 11, pp. 170-71.

Q: And when you say first year, when did the first of the year start?

A: It started in August.

Q: In August, 2001?

A: Yes, ma'am.

Q: So, you've known her since that point in time and basically spend six to seven hours a day with her, is that right?

A: Yes, ma'am.

Q: Ms. McLemore, I want to ask you about – you are aware because of this trial that there was an offense against [O.S.] that occurred on September the 1st of 2001, is that right?

MR. LEWIS: Your honor, I'm going to object. That's an improper statement. An allegation – that's the province of the jury to decide that.

THE COURT: Sustained as to the form of the question.[20]

Finally, Coy argues that his attorney should have objected when the prosecutor asked O.S.'s mother:

Q: Now, she – she has had quite a bit of absences in the fourth grade this year.

A: Correct.

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[20] Reporter's Record, Volume 12, pp. 176-78.

. . .

Q: Okay. And many of these have been related to issues from her being a victim; is that right?

A: Yes, ma'am.[21]

Three pages later in the trial transcript the prosecutor asked O.S.'s mother:

Q: So, I want to ask you any questions you might have had with [John Hernandez], after you found out about your daughter being molested by the defendant.

MR. LEWIS: Your Honor, I'm going to object. Miss Oncken's making this reference. She's assuming facts that haven't been decided yet. That's a jury's province. It's an allegation, still, at this time.

THE COURT: Sustained as to the form of the question.[22]

The state habeas court found that Coy's attorney did not object to references of O.S. as a "victim" because he had "decided to strategically limit his objections during trial, but nonetheless determined to make an objection if he believed use of the term 'victim' was particularly harmful or prejudicial" and that Coy's counsel recognized that state case law did

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[21] Reporter's Record, Volume 16, pp. 28-29.

[22] *Id.* at 32.

not directly support his motion in limine.[23] Coy has not overcome the presumption of correctness with regard to this factual finding. 28 U.S.C. § 2254(e)(1). Coy's attorney testified to this effect at the habeas hearing,[24] and the record reflects that Coy's attorney repeatedly reminded the jury that it was to decide whether O.S.'s allegations were true but did not object each time O.S. was referred to as a "victim" in passing.

The state court also found that Coy failed to show that his counsel's conduct fell below an objective standard of reasonableness or that he was prejudiced by his counsel's conduct – i.e., the state court found that Coy failed to make a *Strickland* showing.[25] This finding is reviewed under section 2254(d)(1). *Martin v. Cain,* 246 F.3d 471, 475 (5th Cir. 2001). The state court found that the strategy employed by Coy's attorney was reasonable. Given *Strickland*'s strong presumption that counsel's actions fall within the wide range of reasonable professional assistance, this court cannot conclude that the state court's decision was an unreasonable application of the first prong of the *Strickland* test. Furthermore, merely referencing O.S. as a "victim" does not undermine confidence in the outcome of the trial, making the state court's decision a reasonable application of the *Strickland*

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[23] *Ex parte Coy,* Appl. No. WR-65,301-01, pp. 222-23.

[24] Reporter's Record, Writ Hearing, Vol. 1, p. 41.

[25] *Id.* at 222, 240.

test's second prong. *Cf. Wiley v. Puckett,* 969 F.2d 86, 102 (5th Cir. 1992) ("[Petitioner's counsel] could reasonably have decided not to risk antagonizing the jury by objecting, or he could have decided that his best strategy was to let his own closing argument speak for itself. Whatever the reason he chose not to object, we do not view his conduct as ineffective assistance.").

Coy also argues that his counsel was ineffective for failing to object when, during her opening statement, the prosecutor referred to the complainant as "the victim in the case" and made other similar references.[26] "A prosecutor's assertion of what he believes the evidence will show and has shown is not error." *Ortega v. McCotter,* 808 F.2d 406, 410 (5th Cir. 1987) (citing *United States v. Morris,* 568 F.2d 396, 401 (5th Cir. 1978) ("[a]n attorney's statements that indicate his opinion or knowledge of a case as therefore presented before the court and jury are permissible if the attorney makes it clear that the conclusions he is urging are conclusions to be drawn from the evidence")). Here, the prosecutor opened by informing the jury that

> [t]his is what we call opening statement. Each side has the opportunity at this time to tell you what we expect from each side the evidence and testimony to show in the case. So I'm going to . . . hopefully give you a

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[26] Reporter's Record, Volume 10, pp. 9-18.

> better preview of what the testimony and the evidence you can expect to see in this courtroom in the following days in front of you.[27]

The prosecutor also repeatedly told the jury "you will hear testimony that . . . " and that the complainant "will tell you how it happened."[28] The prosecutor closed by saying "So, the evidence and testimony that I expect you'll hear from the witnesses is, as I've told you, that [O.S.] was molested by [Coy] on the night of September 1, 2001. . . ."[29] Not objecting to the prosecutor's remarks was consistent with the trial counsel's strategy of limiting his objections except when particularly harmful. The court therefore concludes that the state court's finding that Coy did not make the showing required by *Strickland* with regard to the prosecutor's opening statements was not contrary to, or an unreasonable application of, the standards provided by clearly established federal law.[30] *See also Boyde v. California,* 110 S. Ct. 1190, 1200 (1990) ("[T]he arguments of counsel . . . must be judged in the context in which they are made.").

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[27] *Id.* at 8.

[28] *Id.* at 12-36.

[29] *Id.* at 36.

[30] All of Coy's claims regarding the prosecutor's statements during opening and summation are denied for this reason.

B. Testimony that the Complainant was Telling the Truth

Coy next argues that his trial counsel was ineffective for failing to file a motion in limine to exclude opinion testimony that O.S. was telling the truth about the sexual assault and for not repeatedly objecting to such testimony.[31] The first instance Coy points to occurred during cross-examination of O.S.'s mother, Maryvel Ramirez, when Coy's trial counsel asked Ms. Ramirez:

> Q: . . . And if I got your testimony right, you told [your sister] that you were sure that [the molestation] had happened; is that right?
>
> A: My sister?
>
> Q: Right.
>
> A: I never told her I was – I mean, we knew it was true.[32]

The state habeas court found that Coy's attorney elicited these statements "for the purpose of committing Ramirez to her prior testimony, so that [he] could subsequently impeach Ramirez with the previous inconsistent statement reflected in the complainant's medical records [that she was not sure the sexual assault actually occurred]." The state court further

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[31] Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, pp. 11-15.

[32] Reporter's Record, Volume 10, p. 152.

found that this strategy was reasonable and that Coy's trial counsel therefore had no reason to object to Ms. Ramirez's statements.[33] The court concluded that Coy failed to show both prongs of the *Strickland* test.[34]

Coy argues that it "is illogical, not to mention an unreasonable strategy, for counsel not to object to inadmissible, prejudicial testimony for the purpose of impeaching the witness when he could exclude the testimony in the first instance by a motion in limine or an objection."[35] However, by impeaching Ms. Ramirez's credibility on this issue Coy's counsel stood to discredit her entire testimony. The very statements Coy complains about, that Ms. Ramirez believed O.S. was telling the truth, were the same statements used to impeach her by confronting her with prior contradictory statements. "Given the almost infinite variety of possible trial techniques and tactics available to counsel, [the court] is careful not to second guess legitimate strategic choices." *Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993). The court therefore concludes that the state court's finding that the trial counsel's strategy was reasonable – and that Coy therefore failed to show the first prong of the *Strickland* test – was a reasonable application of Federal law as decided by the Supreme Court.

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[33] *Ex parte Coy*, Appl. No. WR-65,301-01, p. 224.

[34] *Id.* at 240-41.

[35] Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, p. 12.

Coy also argues that his attorney should have objected when the prosecutor asked Ms. Ramirez "about any conversations [she] might've had with [John Hernandez], after [she] found out about [her] daughter being molested," and Ms. Ramirez replied that she "told him that [Coy] molested [O.S.]."[36] The state court found that Coy failed to meet both prongs of the *Strickland* test with regard to this claim.[37] The record reflects that Coy's attorney objected directly after the prosecutor's question, reminding the jury that it was still to be decided whether O.S. had been molested by Coy.[38] Furthermore, to the extent that Ms. Ramirez was stating her belief that O.S. was telling the truth about the crime, such testimony was duplicative of evidence properly elicited during her cross-examination, making such an objection of little value. *See Romero v. Lynaugh,* 884 F.2d 871, 879 (5th Cir. 1989) ("[Petitioner] points to seven instances in which [his counsel] is said to have failed to block the receipt of evidence. In each instance, the evidence was either clearly admissible or duplicative of evidence properly received."). The court therefore

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[36] Reporter's Record, Volume 16, pp. 31, 35; Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, p. 12.

[37] *Ex parte Coy,* Appl. No. WR-65,301-01, p. 240.

[38] Reporter's Record, Volume 16, p. 31.

concludes that the state court's decision was a reasonable application of the *Strickland* test.[39]

Coy also argues that his trial attorney was ineffective for failing to object when Ms. Ramirez testified that her father died the day after learning that "[Coy] had molested [O.S.]."[40] The state court found that this statement was not a direct opinion about O.S.'s truthfulness and was therefore not objectionable, and that Coy's attorney did not object to this testimony because he did not consider it improper opinion testimony and because he believed that it was not inconsistent with his defense theories.[41] The state court concluded that Coy failed to show both prongs of the *Strickland* test on this claim.[42] Given *Strickland's* strong presumption that counsel's actions fall within the wide range of reasonable professional assistance, this court cannot conclude that the state court's decision was an unreasonable application of the *Strickland* test.

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[39] Coy also complains of Ms. Ramirez's testimony that she was seeing a therapist to help her deal with Coy's "molesting [her] child." *Id.* at 44. To the extent that this constitutes an opinion regarding the veracity of O.S.'s allegations, it too is duplicative of evidence properly elicited earlier. The same is true for Coy's complaint that Officer Milligan and John Hernandez testified that Ramirez told them that she believed her daughter had been molested. Reporter's Record, Vol. 10, p. 194; Vol. 14, p. 22.

[40] Reporter's Record, Vol. 16, p. 47.

[41] *Ex parte Coy*, Appl. No. WR-65,301-01, pp. 225-26.

[42] *Id.* at 240.

Coy next argues that his trial counsel was ineffective for failing to object when O.S.'s teacher, Nicoya McLemore, testified that O.S. is "very honest" and that she "can always take anything [O.S.] says as the God's honest truth."[43] He also claims that his attorney should have objected when the school nurse, Cynthia Womack, testified that she knew that "something had happened to [O.S.]" based on O.S.'s frequent trips to the infirmary.[44] The state court found that Coy failed to satisfy both prongs of the *Strickland* test.[45] During the state habeas hearing Coy's trial counsel testified that he made the strategic decision not to be hostile to O.S. because he believed the jury would find it more palpable.[46] This falls within the wide range of reasonable professional assistance. The court therefore concludes that the trial court's decision was a reasonable application of *Strickland*.

Finally, Coy argues that his attorney should have objected when Susan Szczygielski, O.S.'s therapist, testified about O.S.'s behavior "since the abuse had happened" and that she did not see "anything to

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[43] Reporter's Record, Vol. 12, p. 181. Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, p. 13.

[44] Reporter's Record, Vol. 12, pp. 190-91. Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, p. 13.

[45] *Ex parte Coy*, Appl. No. WR-65,301-01, pp. 242.

[46] Reporter's Record, Writ Hearing, Vol. 2, pp. 75, 77-79.

suggest that [the abuse] did not actually occur."[47] The state court held that Coy failed to show that such testimony was inadmissible and that, therefore, Coy did not show that his counsel was deficient in failing to object, and that, in any event, Coy failed to show the prejudice prong of the *Strickland* test.[48] The record reflects that the trial court held a hearing before concluding that Ms. Szczygielski was an expert for the purpose of giving her professional opinion. Coy does not challenge this ruling. The record also reflects that Coy's counsel vigorously cross-examined Ms. Szczygielski, establishing that O.S.'s behavior was not conclusive of sexual abuse and could be attributable to something else, that the therapist never questioned O.S. with regard to whether the allegation could have been a dream (and that such a dream could produce the symptoms Ms. Szczygielski described), and that one of O.S.'s symptoms, headaches, had gone away when she got glasses.[49] The court concludes that the state court's decision that Coy did not meet the *Strickland* burden is a reasonable application of Federal law. *Cf. U.S. v. Simmons*, 470 F.3d 1115, 1124 (5th Cir. 2006) ("Mental-health experts are permitted to testify that 'symptoms and recollections appear[ ] genuine and that [the expert

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[47] Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, p. 13.

[48] *Ex parte Coy*, Appl. No. WR-65,301-01, p. 243.

[49] Reporter's Record, Vol. 13, pp. 77, 80-82, 84, 85, 94, 98, 105.

believes she or] he ha[s] not been 'duped' by a fabricated account.") (quoting *Skidmore v. Precision Printing & Pkg., Inc.*, 188 F.3d 606, 618 (5th Cir. 1999)).[50]

C. The Possibility of a Civil Lawsuit

Coy argues that he was deprived of effective counsel because he "failed to conduct a reasonable investigation to determine whether Ramirez had a financial motive to prosecute applicant," did not file a pretrial motion requesting disclosure of whether O.S.'s family intended to file a civil suit against Coy,

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[50] Coy also claims that his trial counsel was ineffective for failing to object when Detective Heidi Ruiz testified that the "offense took place on the 1st" and that she was aware that Coy spent the night in his daughter's bed "on the night that the offense occurred." Reporter's Record, Vol. 11, pp. 180, 193; *id.*, Vol. 12, pp. 49-50; *id.* at 13. Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, p. 13. The state court found that these statements did not reflect an opinion that O.S. was telling the truth about the sexual assault and that Coy failed to show that his counsel's conduct was deficient or that he was prejudiced by his counsel's failure to object to these statements. *Ex parte Coy*, Appl. No. WR-65,301-01, pp. 227, 242. Coy also complains that Detective Ruiz testified that she had to sign a sworn statement that she believed an offense had taken place in order to get an arrest warrant for Coy. However, the record reflects that the trial judge had ruled in a prior hearing that Detective Ruiz could testify to that fact and when she testified with regard to O.S.'s credibility. Coy's attorney promptly objected. Reporter's Record, Vol. 11, pp. 173, 183. The court concludes that the state court's decision is a reasonable application of the *Strickland* standard.

and did not question O.S.'s mother about her intentions regarding a civil suit.[51]

The state court found that O.S.'s parents did not decide to file a civil lawsuit against Coy until after the criminal trial was over and that, therefore, Coy failed to establish both prongs of the *Strickland* test.[52] "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2)." *Miller-El v. Cockrell,* 123 S. Ct. 1029, 1041 (2003). Coy argues that the state court's decision is unreasonable in light of the facts presented at the habeas hearing because he filed the affidavit of Carey Wellmaker, a private investigator, which states:

> I [Wellmaker] have been informed that Maryvel Ramirez denied in an affidavit that she told me that she spoke with Ed Hennessey before the criminal trial; that he said that if he filed a civil lawsuit at that time, it would hurt the criminal case; and that he agreed to file a civil lawsuit after the criminal trial was over. I reiterate and can

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[51] Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, pp. 15-17. O.S.'s parents filed a civil lawsuit after the criminal trial was completed.

[52] *Ex parte Coy,* Appl. No. WR-65,301-01, pp. 231, 244.

> substantiate the contents of my previous affidavit, as I recorded the conversation.[53]

The state court, based on the affidavit of Ms. Ramirez, found that O.S.'s parents were concerned that the prosecutors were not going to be aggressive enough during the trial. For this reason O.S.'s parents went to Mr. Hennessey's office, but spoke only with Mr. Hennessey's assistant to voice their concerns that they thought the prosecutors needed more help. The court concluded that O.S.'s parents never agreed with Hennessey or anyone from his office that they would file a civil lawsuit once the criminal trial was over and that they did not decide to do so until after the criminal trial was over.[54]

The state court was entitled to make a credibility determination between the two affidavits. This court cannot conclude, based on Mr. Wellmaker's affidavit, that Coy has overcome the presumption of correctness by clear and convincing evidence. Because O.S.'s parents did not decide to file a civil lawsuit until after the criminal trial was over, the state court's determination that Coy failed to establish both prongs of the *Strickland* test is a reasonable application of Federal law.

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[53] *Id.*, Affidavit of Carey Wellmaker, p. 267.

[54] *Ex parte Coy*, Appl. No. WR-65,301-01, pp. 231-32.

D. Irrelevant and Prejudicial Testimony

Coy argues that his trial attorney was ineffective because he opened the door to or failed to object to irrelevant, prejudicial testimony.[55]

1. Testimony that Coy was Grooming His Daughter for Future Sexual Assaults

The first instance Coy points to occurred during the direct examination of Detective Ruiz, who testified that one of the steps in her investigation was to advise the Children's Protective Services agency ["CPS"] that Coy's daughter needed to be interviewed because she felt that his daughter might also be at risk for being sexually assaulted.[56] On cross-examination Coy's attorney asked, "Is it not true that you in your investigation have absolutely no evidence that [Coy's daughter] has been sexually abused?" Detective Ruiz answered "That's not correct. I feel he was grooming her to sexually assault her later on."[57] Coy's attorney continued to question Detective Ruiz until she admitted that she had no testimonial, physical, or any other evidence that Coy's daughter had been abused.[58] On redirect the prosecutor asked Detective Ruiz to explain the term "grooming" to the

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[55] Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, p. 20.

[56] Reporter's Record, Vol. 11, p. 183.

[57] Reporter's Record, Vol. 12, p. 40.

[58] *Id.* at 41.

jury.[59] Coy's counsel objected to the question but was overruled.[60]

The state court found that Detective Ruiz's testimony on direct examination that she recommended that Coy's daughter be interviewed by CPS was relevant to the course and scope of her investigation and that it was not evidence that Coy had committed an extraneous sexual assault, so it was not objectionable on those grounds.[61] Coy argues that his trial counsel should have objected to this testimony because it was irrelevant and inadmissible under state law.[62] However, nothing about the state court's finding regarding the admissibility of Detective Ruiz's initial comment is contrary to or an unreasonable application of Supreme Court precedent, and "[i]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Trevino v. Johnson,* 168 F.3d 173, 184 (5th Cir. 1999) (quoting *Estelle v. McGuire,* 112 S. Ct. 475, 480 (1991)).

The state court also found that Coy's attorney decided to question Detective Ruiz on this matter

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[59] *Id.* at 50.

[60] Coy's attorney objected that it was an "improper opinion" and the court answered that he "certainly asked for her [sic] a whole bunch of opinions. In any event, she brought up the term grooming." *Id.* at 51-52.

[61] *Ex parte Coy,* Appl. No. WR-65,301-01, p. 232.

[62] Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, pp. 20-22.

during cross-examination in order to convey to the jury that she was biased and overzealous against Coy and therefore not credible and that this is a reasonable trial strategy under the *Strickland* standard.[63] Also, because Coy's attorney effectively cross-examined Detective Ruiz and demonstrated her lack of evidence for her opinion, the court held that Coy failed to show that he was prejudiced by his counsel's strategy.[64] Coy argues that the state court's finding that his counsel's strategy was reasonable "ignored the fact that, had [counsel] filed a motion in limine or objected to the question on direct examination, he would have had no reason to cross-examine Ruiz on this subject."[65] However, given the fact that Detective Ruiz's testimony on direct was not objectionable, the state court's determination that Coy failed to establish both prongs of the *Strickland* test was not an unreasonable application of Federal law.

2. Testimony that Coy Beat Women and Used Drugs

Coy next faults his trial counsel for opening the door to testimony that Coy beat women and used drugs.[66] The state court found that Coy's attorney cross-examined O.S.'s mother in an attempt to

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[63] *Id.* at 244-45.

[64] *Id.* at 245.

[65] *Id.* at 21.

[66] *Id.* at 23.

establish that she had once had an affair with Coy and now harbored a bias against him and therefore had a reason to lie about the molestation charges.[67] Ms. Ramirez denied the affair on cross-examination but admitted that, prior to the events on September 1, 2001, there came a point where she no longer liked Coy.[68]

Thereafter, Coy's counsel sought to call John Hernandez to testify that Ms. Ramirez told him that she had an affair with Coy. The trial court ruled that doing so would open the door for Ms. Ramirez to rebut her testimony about why she disliked Coy.[69] In the state habeas hearing Coy's counsel testified that he decided to call Mr. Hernandez to the stand despite the court's ruling because he reasoned that the trade-off was worth it.[70] When the State recalled Ms. Ramirez in rebuttal and asked her why she did not like Coy she responded, "[H]e beat up on his wife and current girlfriend. He's rude, he does drugs and he cheats on his wife."[71]

Coy alleges that his counsel's decision to open the door to this testimony was not reasonable trial strategy because, "as a result of an inadequate investigation, he did not know that Hernandez would testify

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[67] *Ex parte Coy*, Appl. No. WR-65,301-01, p. 233.

[68] Reporter's Record, Vol. 10, p. 135.

[69] Reporter's Record, Vol. 14, pp. 3-9.

[70] Reporter's Record, Writ Hearing, Vol. 2, pp. 74-75.

[71] Reporter's Record, Vol. 16, p. 27.

that [Coy] had signed an agreement to give $100,000 to Hernandez, that Hernandez had been in rehab for alcohol, and that Hernandez had no reason to disbelieve Ramirez about the sexual abuse."[72] However, the record reflects that Coy's counsel interviewed Mr. Hernandez before calling him to the stand.[73] Additionally, Mr. Hernandez testified that he had not been friends with Coy for eight years, that he had not been given anything in consideration for Coy's "promise," and that he never expected Coy to pay him anything.[74] Applying *Strickland*'s strong presumption that counsel's actions fall within the wide range of reasonable professional assistance, this court cannot conclude that the state court's decision was an unreasonable application of the first prong of the *Strickland* test. Furthermore, given the fact that this strategic decision brought the affair to the attention of the jury, Ms. Ramirez's testimony does

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[72] Reporter's Record, Vol. 14, pp. 23-26.

[73] Reporter's Record, Writ Hearing, Vol. 2, pp. 70-71. In fact, Coy's counsel testified in the state habeas hearing that it was Coy and his family who suggested putting Mr. Hernandez on the stand to prove the affair. *Id.* at 70. "In assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.' . . . 'Every effort [must] be made to eliminate the distorting effects of hindsight.'" *Wiggins v. Smith*, 123 S. Ct. 2527, 2536 (2003) (quoting *Strickland*, 104 S. Ct. at 2052).

[74] Reporter's Record, Vol. 14, pp. 24-27.

not undermine confidence in the outcome of the trial, making the state court's decision a reasonable application of the *Strickland* test's second prong.

3. Mention of Coy's Record Company's Name

Coy alleges that his trial counsel was ineffective for failing to file a motion in limine and objecting to testimony that the name of his record company is "Dope House Records."[75] The state court found that (1) the name of the company was used only three times during the trial, (2) the State never used the name to imply that Coy engaged in criminal activity, (3) Coy's attorney believed that the word "dope" had several positive connotations in the rap and hip-hop culture and was comfortable with the term and did not believe that it carried a negative connotation, and (4) Coy therefore failed to establish deficient performance or prejudice.[76]

The record reflects that Detective Ruiz stated that the business owned by Coy and his brother "is Dope House Records" and that Ms. Ramirez testified that Arthur Coy "is the president of Dope House Records, and he's in charge of all the money."[77] Also,

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[75] Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, pp. 25-26.

[76] *Ex parte Coy*, Appl. No. WR-65,301-01, pp. 235, 246.

[77] Reporter's Record, Vol. 12, p. 10; Reporter's Record, Vol. 16, p. 30.

during summation the prosecutor stated that Coy's brother, Arthur, was "the money guy for Dope House Records who runs Coy's entertainment company."[78] The court concludes that the state court's decision was not objectively unreasonable in light of the evidence in the record.

E. Testimony that O.S.'s Grandfather Died After Learning of the Allegations

Coy next reiterates his argument that his trial counsel was constitutionally ineffective for not objecting to Ms. Ramirez's testimony about her father's death.[79] On cross-examination Coy's attorney asked Ms. Ramirez questions about therapy she had received to deal with the allegations in the criminal trial.[80] This was done in an attempt to obtain the therapist's records because Coy's counsel believed they might contain prior inconsistent statements by Ms. Ramirez that could be used to impeach her.[81] Ms. Ramirez answered that she had sought counseling regarding Coy "molesting [her] child."[82] On redirect Ms. Ramirez testified that she also sought therapy to deal with the death of her father, who died from a

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[78] Reporter's Record, Vol. 17, p. 57.

[79] Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, pp. 27-29.

[80] Reporter's Record, Vol. 16, pp. 43-44.

[81] *Ex parte Coy*, Appl. No. WR-65,301-01, p. 236.

[82] Reporter's Record, Vol. 16, p. 44.

heart attack the day after finding out about the abuse.[83] Ms. Ramirez stated that "He said he couldn't take it. He told my mother."[84] Afterwards, Coy's counsel re-urged his request for the therapist's records.[85]

The state court found that Ms. Ramirez's testimony about her father's death was relevant to the matter of why she was in therapy and that Coy's attorney did not believe that it adversely affected the jury.[86] The state court also found that her testimony was not offered for the truth of the matter asserted, namely, that her father died of a heart attack upon learning of the sexual assault, but rather was offered as further reason for Ms. Ramirez receiving therapy.[87] Based on these findings the state court concluded that Coy failed to show that his trial counsel was deficient or that he suffered prejudice from his counsel's conduct.[88]

Coy argues that his attorney should have objected to the testimony about Ms. Ramirez's father because it constituted inadmissible victim-impact evidence and hearsay because it was offered to prove

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[83] *Id.* at 47.

[84] *Id.*

[85] *Id.* at 64-65.

[86] *Ex parte Coy*, Appl. No. WR-65,301-01, p. 237.

[87] *Id.*

[88] *Id.* at 246.

the truth of the matter asserted.[89] However, nothing about the state court's finding regarding the admissibility of Ms. Ramirez's testimony is contrary to or an unreasonable application of Supreme Court precedent, and "[i]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Trevino v. Johnson,* 168 F.3d 173, 184 (5th Cir. 1999) (quoting *Estelle v. McGuire,* 112 S. Ct. 475, 480 (1991)). Because the statements were not offered for the truth of the matter asserted, the state court's decision regarding Coy's counsel's failure to object was a reasonable application of the *Strickland* test.[90]

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[89] Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, pp. 28-29. Coy also argues that this testimony was offered for the truth of the matter asserted because the prosecutor mentioned this testimony during summation. However, "[a] prosecutor's assertion of what he believes the evidence will show and has shown is not error." *Ortega v. McCotter,* 808 F.2d 406, 410 (5th Cir. 1987) (citing *United States v. Morris,* 568 F.2d 396, 401 (5th Cir. 1978). *See also supra* note 41 and accompanying text.

[90] Coy also argues that his attorney should have questioned Ms. Ramirez about her therapy outside the presence of the jury pursuant to Texas Rule of Evidence 104(c). Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, p. 28. Rule 104(c) states that "hearings on preliminary matters shall be conducted out of the hearing of the jury when the interests of justice so require . . . " Tex. R. Evid. § 104(c). The record reflects that Coy's counsel had two hearings outside the presence of the jury regarding the discovery of the therapist's records. Reporter's Record, Writ Hearing, Vol. 2, pp. 48-49. The court therefore concludes that the state court's decision was a

(Continued on following page)

F. Prosecutor's Argument that O.S.'s Testimony was Uncontradicted

Coy next claims that his trial counsel was constitutionally ineffective for failing to object when the prosecutor made remarks that the State's case was uncontradicted, thereby commenting on Coy's failure to testify.[91] During summation the prosecutor argued:

> But this is basically what it is we have to prove. It's this Defendant, Carlos Coy, and, you know, that has not been contradicted by a bit of testimony. It's this Defendant, Carlos Coy. No doubt about it.
>
> That it happened on or about September 1st, 2001, Labor Day weekend. Are you tired of hearing about it? Labor Day weekend, Saturday night at Carlos Coy's house.
>
> That it happened in Harris County, Texas. We know it happened at his house on Cayton Street. Even got the pictures in evidence if you want to take a look at them.
>
> Totally uncontradicted by any testimony whatsoever.
>
> Further in the indictment we have to prove that it was this child, [O.S.]. And that is uncontradicted that it's this child. And the

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reasonable application of Federal law as determined by the Supreme Court.

[91] Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, p. 29.

> Defendant intentionally and knowingly caused the sexual organ of the little girl to contact his mouth.
>
> And you heard testimony that his tongue licked her vagina. The tongue is part of the mouth. Further that this child is under 14, nine years old. That's not contradicted by any testimony. And certainly that she is not his spouse.
>
> Ladies and gentlemen, that is all that the State of Texas has to prove to you.[92]

The Fifth Amendment prohibits the government from commenting on the fact that a defendant failed to testify. *Griffin v. California,* 85 S. Ct. 1229, 1233 (1965). A prosecutor's comment is improper if (1) it was the prosecutor's "manifest intention to comment on the accused's failure to testify" or (2) the comment "was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States v. Rochan,* 563 F.2d 1246, 1249 (5th Cir. 1977). "While it is improper to comment upon the failure of a defendant to take the stand, it is well established that one may point out that the testimony of witnesses is uncontradicted, particularly where someone other than the defendant could have offered contrary evidence." *United States v. Jennings,* 527 F.2d 862, 871 (5th Cir. 1976).

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[92] Reporter's Record, Vol. 17, pp. 46-47.

The state court found that the prosecutor did not argue that the element of whether the applicant actually committed the act of sexual assault was uncontradicted, only that Coy's identity and other elements were uncontradicted.[93] The court further found that Coy's counsel agreed with this interpretation of the prosecutor's remarks and that his decision not to object was consistent with his strategy of not attacking O.S.'s credibility.[94] Given the trial counsel's strategy of limiting his objections, the fact that there was a benign explanation for the prosecutor's remarks, and the fact that contradictory evidence could have been offered on cross-examination of O.S., this court cannot conclude that it was an unreasonable application of *Strickland* for the state court to determine that Coy did not establish that his counsel was deficient for failing to object to the prosecutor's remarks.

G. Arguments Attacking Defense Counsel

Coy's final argument is that his trial counsel was ineffective for unreasonably inviting and then failing to repeatedly object to the prosecutor's arguments attacking him for "trying to hide the truth and keep [Coy] out of jail for a fee."[95] During summation Coy's

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[93] *Ex parte Coy*, Appl. No. WR-65,301-01, p. 237.

[94] *Id.* at 238.

[95] Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, p. 31.

attorney argued that O.S. "is the product of [the prosecutor's] overzealous efforts to convict someone she wants so badly to convict;"[96] that the prosecutor overreached in questioning a defense expert;[97] that the prosecutor was on a "witch hunt to convict this popular guy;"[98] and that "in a final act of desperation," the prosecutor talked out of both sides of her mouth in criticizing the defense for failing to test the bed sheets.[99]

During her rebuttal summation the prosecutor responded as follows:

> [T]hey don't want you to look at the evidence and the truth.
>
> Our job as prosecutors is to seek the truth. That's not his job. His job is to represent Carlos Coy.
>
> MR. LEWIS: Your Honor, I'm going to object. My job is the same as theirs.
>
> MS. ANDREWS: I'm responding to the direct attacks on the prosecution.
>
> THE COURT: Overruled.
>
> MS. ANDREWS: His job is to represent Carlos Coy, keep him from going to jail.

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[96] Reporter's Record, Vol. 17, p. 72.

[97] *Id.* at 82.

[98] *Id.* at 83.

[99] *Id.* at 102.

That's what he gets paid to do. Ms. Oncken and I get paid –

MR. LEWIS: I'm going to object, Your Honor, the State of Texas gets paid just like I do. Improper argument.

THE COURT: Overruled.

MS. ANDREWS: Ms. Oncken and I get paid to prosecute people who abuse children. And I can tell you we've got enough work to do without having to manufacture a case. We don't care that he's a rapper or a musician –

MR. LEWIS: Your Honor, I'm going to object. Ms. Andrews' personal feelings are improper.

THE COURT: Overruled.

MS. ANDREWS: It's not important to us who he is or how much money he has because of the fact that he molested a nine-year-old little girl and that is the only reason that we're here today. The only one. Because [O.S.] deserves justice whether or not he has enough money to hire experts, to have a great lawyer to come in here and spin the truth, because we're here to decide the truth and we all know the truth. It's what [O.S.] told.[100]

. . .

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[100] Reporter's Record, Vol. 17, pp. 120-21.

> We've proven our case beyond a reasonable doubt because we've put forward a truthteller, as the Defense called her. She is an honest little girl and she told you what happened. The dream, the revenge, all the other rabbit trails that the Defense has wanted you to go down are just that, they're just defense tactics because they're the ones that are desperate.
>
> We're just putting forth the facts and the truth. They're trying to hide the truth. That's his job.[101]

The state court found that all of the prosecutor's comments were invited by Coy's counsel during summation and made in response thereto, and therefore were not objectionable.[102] The court also found that part of the defense's strategy was to cast O.S. as a "truth teller" who was manipulated by various state actors, especially the prosecutors, for the sole purpose of convicting Coy at all costs, that his argument during summation was consistent with this strategy, and that this trial strategy was reasonable.[103] Based on these findings the state court concluded that Coy's counsel was not deficient and that, in the alternative, Coy had failed to show prejudice from his counsel's conduct.[104]

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[101] *Id.* at 125.

[102] *Ex parte Coy*, Appl. No. WR-65,301-01, p. 239.

[103] *Id.*

[104] *Id.* at 248.

Coy argues that his counsel's summation argument was "profoundly unreasonable" because it invited the prosecutor's rebuttal.[105] However, *Strickland*'s strong presumption that counsel's actions fall within the wide range of reasonable professional assistance precludes this court from concluding that the state court's decision in this case was an unreasonable application of the first prong of the *Strickland* test. *Yohey v. Collins,* 985 F.2d 222, 228 (5th Cir. 1993) ("[the court] is careful not to second guess legitimate strategic choices."). Furthermore, given the fact that Coy's attorney objected three times during the prosecutor's rebuttal, stating "[m]y job is the same as theirs" and "the State of Texas gets paid just like I do," the prosecutor's remarks do not undermine confidence in the outcome of the trial, making the state court's decision a reasonable application of the *Strickland* test's second prong.

Although Coy argues that his counsel's failure to make continued objections to the prosecutor's statements constituted deficient performance, the state court found that all of the prosecutor's comments were not objectionable. Nothing about this finding is contrary to or an unreasonable application of Supreme Court precedent and "[i]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Trevino v. Johnson,* 168 F.3d 173, 184 (5th Cir. 1999) (quoting

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[105] Petition for a Writ of Habeas Corpus of a Person in State Custody, Docket Entry No. 1, p. 35.

Estelle v. McGuire, 112 S. Ct. 475, 480 (1991)). Furthermore, the record reflects that Coy's counsel objected three times and testified in the state habeas hearing that part of his trial strategy was to limit his objections to avoid alienating the jury. *See Wiley v. Puckett,* 969 F.2d 86, 102 (5th Cir. 1992) ("[Petitioner's counsel] could reasonably have decided not to risk antagonizing the jury by objecting, or he could have decided that his best strategy was to let his own closing argument speak for itself. Whatever the reason he chose not to object, we do not view his conduct as ineffective assistance."). For these reasons the state court's determination that Coy failed to establish both prongs of the *Strickland* test is a reasonable application of state law.

IV. Conclusion and Order

For the reasons explained above, Respondent Quarterman's Motion for Summary Judgment (Docket Entry No. 8) is **GRANTED**, and Coy's Petition for a Writ of Habeas Corpus of a Person in State Custody (Docket Entry No. 1) is **DENIED**.

SIGNED at Houston, Texas, on this the 13th day of June, 2007.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARLOS COY, TDCJ-CID NO. 1110642, Petitioner, v. NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § § § § § § § § §	CIVIL ACTION NO. H-07-0302 (Filed June 13, 2007)

FINAL JUDGMENT

In accordance with the court's Memorandum Opinion and Order entered today, this action is **DISMISSED with prejudice**.

For the reasons stated in the court's Memorandum Opinion and Order and because the petitioner has not made a substantial showing of the denial of a constitutional right, a Certificate of Appealability is **DENIED**.

This is a **FINAL JUDGMENT**.

SIGNED at Houston, Texas, on this the 13th day of June, 2007.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE

APPENDIX D

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

[POSTMARK FEB 8, 2007]

RE: Writ No. WR-65-301-01
STYLE: COY, CARLOS
TRIAL CT NO: 908426-A
2/7/2007

This is to advise that the Court has denied without written order the application for writ of habeas corpus.

Louise Pearson, Clerk

Randy Schaffer
1301 McKinney
Suite 3100
Houston, TX 77010

APPENDIX E

Cause No. 908426-A

EX PARTE	§	IN THE 351st DISTRICT COURT
	§	
CARLOS COY,	§	OF
Applicant	§	HARRIS COUNTY, TEXAS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

(Filed May 25, 2006)

Having reviewed the application for writ of habeas corpus, the Respondent's original answer and first supplemental answer, the reporter's record from the writ evidentiary hearing held on February 10, 2006, February 24, 2006, and March 21, 2006 (including all exhibits introduced at that hearing), the affidavit filed by trial counsel Chip Lewis herein, the affidavit filed by Maryvel Ramirez, the appellate record, and the official court records of the challenged conviction, and having relied upon the trial court's personal recollection, the Court recommends that relief be denied based on the following findings of fact and conclusions of law:

FINDINGS OF FACT

Procedural History

1. The applicant is confined pursuant to the judgment and sentence of the 351st District Court of Harris County, Texas, in cause number 908426

(hereinafter "the primary case"), wherein the applicant was convicted by a jury for the felony offense of aggravated sexual assault of a child; the jury assessed punishment at forty-five years confinement in the Texas Department of Criminal Justice – Institutional Division.

2. The First District Court of Appeals affirmed the applicant's conviction in the primary case in an unpublished opinion delivered November 6, 2003. *Coy v. State,* No. 01-02-00593-CR, 2003 WL 22512075 (Tex. App. – Houston [1st Dist.] November 6, 2003, pet. ref'd).

3. Chip Lewis was retained trial counsel for the applicant in the primary case. The presiding trial court judge was the Honorable Mark Kent Ellis.

4. On September 14, 2005, the applicant filed his post-conviction application for writ of habeas corpus, cause number 908426-A, challenging his conviction in the primary case. Attached to the application, among other exhibits, was the affidavit of Chip Lewis.

5. On February 10, 2006, February 24, 2006, and March 21, 2006, the trial court conducted an evidentiary hearing in the primary case wherein the applicant's trial counsel, Chip Lewis, testified regarding his representation of the applicant in the primary case. The proceedings therein were reported by Official Court Reporter Toni Goubeaud and are transcribed in three volumes of the reporter's record.

See Court Reporter's Record Vols. I through IV (cited herein as ___ W.H. R.R. ___).

Counsel's investigation and trial strategy.

6. The Court finds, based on the reporter's record, the writ evidentiary hearing testimony, and the affidavit of Lewis, that Lewis believed it was important to establish credibility with the jury and therefore chose to adapt his courtroom technique, even to the point of limiting his objections (I W.H. R.R. at 21-22, 24-25).

7. The Court finds, based on the reporter's record, the evidentiary hearing testimony, the affidavit of Lewis, and the Court's own recollection, that one factor that weighed into Lewis' consideration of strategically limiting his objections was that he believed the trial court was noticeably reacting in response to counsel's objections; that Lewis addressed the issue with the trial court and noticed a significant decrease in the responses (I. W.H. R.R. at 23-24, 26-28).

8. The Court finds, based on the reporter's record and the evidentiary hearing testimony, that another factor that weighed into Lewis' consideration of strategically limiting his objections was Lewis' concern that, during the course of trial, as various objectionable issues and the need for bench conferences arose, Lewis believed that the prosecutors, seated near the jury box, would speak between

themselves or react in such a way that the jury might be affected (I W.H. R.R. at 29-30).

9. The Court finds, based on the reporter's record, the evidentiary hearing testimony, and the affidavit of Lewis, that despite the fact that Lewis strategically curtailed his objections during trial based on numerous factors, Lewis nevertheless objected when he believed it was necessary (I W.H. R.R. at 34).

Whether counsel was ineffective for failing to object to references to the complainant as the "victim" during the opening statement, testimony and summation.

10. The Court finds, based on the reporter's record, the evidentiary hearing testimony, and the affidavit of Lewis, that Lewis made an oral motion in limine with respect to the State's referencing the complainant as the victim, that Lewis believed there was arguably authority for this motion but recognized that the case law did not directly support the motion, and that the motion was denied by the trial court (I W.H. R.R. at 20, 40, 50-51).

11. The Court finds, based on the reporter's record, the evidentiary hearing testimony, and the affidavit of Lewis, that Lewis had decided to strategically limit his objections during trial, but nonetheless determined to make an objection if he believed use of the term "victim" was particularly harmful or prejudicial (I W.H. R.R. at 41).

12. The Court finds, based on the reporter's record and the clerk's record that the trial court did not refer to the complainant as the victim in the primary case; therefore, the holdings in *Talkington v. State,* 682 S.W.2d 674 (Tex. App. – Eastland 1984, pet. ref'd), and *Veteto v. State*, 8 S.W.3d 805, 816 (Tex. App. – Waco 2000, pet. ref'd), were inapplicable and not controlling or persuasive authority.

Whether counsel was ineffective for failing to file a motion in limine and object to alleged lay and expert opinion testimony that the complainant was telling the truth about the sexual assault.

13. The Court finds, based on the evidentiary hearing testimony and the affidavit of Lewis, that Lewis anticipated that the State and some of the State's witnesses might attempt to communicate to the jury that they believed the complainant was telling the truth about the sexual assault; however, Lewis did not believe it was necessary to file a motion in limine on this issue, as he planned to object to anything he believed was improper and that merited objection (I W.H. R.R. at 18-19, 31-32).

14. The Court finds, based on the reporter's record, the evidentiary hearing testimony, and the affidavit of Lewis, that Lewis sought to develop several defense theories throughout trial, including the following: the complainant, due to repeated exposure to graphic sexual images in her home environment and elsewhere, dreamed she had been sexually assaulted when, in fact, she was not, but

nevertheless was manipulated by representatives of the State for the purpose of wrongfully prosecuting the applicant; the complainant had actually been sexually assaulted by someone, just not by the applicant, but was nevertheless manipulated by representatives of the State for the purpose of wrongfully prosecuting the applicant; the complainant's mother believed her daughter had been sexually assaulted when, in fact, the complainant had only dreamed of the event; and, the complainant's mother, not really knowing whether the complainant had been sexually assaulted by the applicant, nevertheless sought prosecution of the applicant for personal revenge and financial gain (III W.H. R.R. at 10-12, 62-63).

Testimony by Maryvel Ramirez.

15. The Court finds, based on the reporter's record, the evidentiary hearing testimony, and the affidavit of Lewis, that Lewis sought to use prior inconsistent statements by Maryvel Ramirez reflected in the complainant's medical records to impeach Ramirez' trial testimony about whether she actually believed the applicant had sexually assaulted the complainant (III W.H. R.R. at 12-14).

16. The Court finds, based on the reporter's record and the evidentiary hearing testimony, that Ramirez' statements that she was "sure that it had happened" and "we knew it was true" were elicited by Lewis on cross-examination for the purpose of committing Ramirez to her prior testimony, so that Lewis

could subsequently impeach Ramirez with the previous inconsistent statement reflected in the complainant's medical records; the Court further finds that these statements were elicited by Lewis based on reasonable trial strategy and counsel had no reason to object to such testimony (III W.H. R.R. at 13-14).

17. The Court finds, based on the reporter's record and the evidentiary hearing testimony, that Ramirez' response of "I did" to the prosecutor's question about whether Ramirez had a conversation with someone after the complainant "was molested" does not constitute improper direct opinion testimony about the complainant's truthfulness and is therefore not objectionable (XVI R.R. at 31).

18. The Court finds, based on the reporter's record and the evidentiary hearing testimony, that Ramirez testified on cross-examination that she told family friend John Hernandez that the applicant had molested the complainant; that this statement became relevant because of testimony Lewis previously elicited from Hernandez as part of his reasonable trial strategy; that this statement by Ramirez is not a direct opinion about the complainant's truthfulness and is therefore not objectionable (XVI R.R. at 35; III W.H. R.R. at 17, 18).

19. The Court finds, based on the reporter's record and the evidentiary hearing testimony, that Ramirez testified on cross-examination that she sought therapy at the Children's Assessment Center (CAC) to help her deal with issues relating to the

applicant molesting the complainant; that this testimony was elicited as a result of Lewis' attempt to establish a basis for examining the CAC records; that Lewis did not object to this testimony at trial because he did not believe it was improper opinion testimony; and, that this statement by Ramirez is not a direct opinion about the complainant's truthfulness and is therefore not objectionable (XVI R.R. at 43-44; III W.H. R.R. at 20-22).

20. The Court finds, based on the reporter's record and the evidentiary hearing testimony, that Ramirez testified on direct examination that her father did not know that the applicant had molested the complainant; that Lewis believes that whether or not Ramirez actually believed the complainant was molested was not inconsistent with his defense theories at the time of trial; and, that this statement by Ramirez is not a direct opinion about the complainant's truthfulness and is therefore not objectionable (XVI R.R. at 46-47; III W.H. R.R. at 24-25).

Testimony of Officer David Milligan.

21. The Court finds, based on the reporter's record and the evidentiary hearing testimony, that Officer David Milligan testified on direct examination that he investigated the initial report of the offense in the primary case; that he observed Ramirez' demeanor as she spoke to Milligan; that Ramirez stated she believed her daughter had been molested; that Milligan's statement does not express an opinion as to

whether the complainant was telling the truth; that Lewis did not believe Milligan's testimony was objectionable at the time of trial; that Milligan's observation that Ramirez may have believed her daughter was "not wholly inconsistent" with Lewis' defense theory; and, that Milligan's statement is not a direct opinion about the complainant's truthfulness and is therefore not objectionable (X R.R. at 194-5; III W.H. R.R. at 25-27).

Testimony of John Hernandez.

22. The Court finds, based on the reporter's record and the evidentiary hearing testimony, that John Hernandez testified on cross-examination that Ramirez believed the complainant had been sexually assaulted; that Lewis did not believe Hernandez' testimony was objectionable at the time of trial; that Hernandez did not given [sic] an opinion as to whether the complainant was telling the truth; that Hernandez' statement that Ramirez believed her daughter had been assaulted was not wholly inconsistent with Lewis' defense theory; and, that Hernandez' statement is not a direct opinion about the complainant's truthfulness and is therefore not objectionable (XIV R.R. at 22; III W.H. R.R. at 27-28).

Testimony of Heidi Ruiz.

23. The Court finds, based on the reporter's record and the evidentiary hearing testimony, that Ruiz' statements that an offense occurred and that

the offense took place on a certain date do not reflect an opinion that the complainant is telling the truth about the applicant sexually assaulting her and do not constitute inadmissible opinion testimony (XI R.R. at 180, 193; XII R.R. at 49-50; III W.H. R.R. at 29-36).

24. The Court finds, based on the reporter's record, the evidentiary hearing testimony, and the affidavit of Lewis that Ruiz testified about the course of her investigation, that she requested that charges of aggravated sexual assault of a child be filed against the applicant, and that when she requested the charge be filed she swore to an affidavit that she believed the crime had occurred in order to obtain the arrest warrant; that Lewis believes Ruiz' testimony is admissible; that Ruiz' testimony is relevant to establish the course and conduct of her investigation and the steps that led to the applicant being charged; that Ruiz' testimony does not constitute direct opinion testimony on the truthfulness of the complainant; that Lewis would have objected to Ruiz' testimony at trial if he believed it was so egregious or improper as to merit an objection (XII R.R. at 13; I W.H. R.R. at 56-59; III W.H. R.R. at 39-40).

Testimony of Nicoya McLemore.

25. The Court finds, based on the reporter's record and the evidentiary hearing testimony, that Nicoya McLemore, the complainant's teacher, testified about the changes she perceived in the complainant's

behavior in the classroom following the sexual assault; that McLemore was not asked to give direct opinion testimony about whether the complainant was telling the truth about the sexual assault; that Lewis did not believe McLemore's testimony was objectionable at the time of trial; and, that McLemore's testimony does not constitute direct opinion testimony on the truthfulness of the complainant and is therefore not objectionable (XII R.R. at 178-181; III W.H. R.R. at 41-42).

Testimony of Cynthia Womack.

26. The Court finds, based on the reporter's record and the evidentiary hearing testimony, that Cynthia Womack, the complainant's school nurse, testified that she knew "something happened" to the complainant; that such testimony was elicited on direct examination and was relevant to Womack's testimony about the complainant's numerous trips to the school infirmary; that Lewis does not believe this testimony is direct opinion testimony on the truthfulness of the complainant; that Lewis would have objected to the testimony if he believed it was harmful or egregiously improper; that Womack's testimony does not constitute direct opinion testimony on the truthfulness of the complainant and is therefore not objectionable (XII R.R. at 190-191; III W.H. R.R. at 43-44).

Testimony of Susan Szczygielski.

27. The Court finds, based on the reporter's record and the evidentiary hearing testimony, that Szczygielski, in describing her therapy with the complainant, testified that the complainant had increased difficulty sleeping since "the abuse had happened," that the complainant was concerned about telling her brothers about the sexual abuse, that the complainant would talk about how she felt about "different parts of the abuse," and that the complainant was quiet and had a "flat affect"; that Lewis did not believe these statements were improper direct opinion testimony; that Lewis did not believe these statements were so harmful or egregious as to warrant an objection; and, that Szczygielski's statements do not constitute direct opinion testimony on the truthfulness of the complainant and are therefore not objectionable (XIII R.R. at 55, 60-63, 66; III W.H. R.R. at 45-50).

28. The Court finds, based on the reporter's record and the evidentiary hearing testimony, that Szczygielski testified on re-direct examination in response to Lewis' cross-examination about whether or not the complainant had dreamed the assault; that Szczygielski testified that the complainant was certain when she told Szczygielski about what happened; that Szczygielski testified that, if she was concerned the assault had not actually happened, then she would have explored that possibility with the complainant; that Lewis believes that, if Szczygielski did express an opinion in the referenced

testimony, then it was "not overt at all"; that Szczygielski's statements do not constitute direct opinion testimony on the truthfulness of the complainant; that Szczygielski's testimony dealt with her normal course of investigation and was relevant to rebut Lewis' theory that the complainant had actually only dreamed the offense happened; that Lewis believes he would have objected to the testimony if he had believed it were egregious or harmful; and, that Szczygielski's statements do not constitute inadmissible direct opinion testimony on the truthfulness of the complainant and are therefore not objectionable (XIII R.R. at 109; III W.H. R.R. at 50-52).

Whether counsel was ineffective for failing to question the complainant's mother about whether she intended to file a civil lawsuit against applicant.

29. The Court finds, based on the reporter's record, the evidentiary hearing testimony, and the affidavit of Lewis, that the applicant's wife and family members had been very involved in the trial and still had contact with some part of Ramirez' family; that Lewis learned, through that relationship, that Ramirez had not sought a lawyer, nor was she looking to sue at the time of trial; that the applicant's family made it clear to Lewis that Ramirez had not met with a lawyer or retained anyone for civil purposes; and that Lewis did not believe he had a good faith basis to question Ramirez about whether she had consulted with or hired a civil lawyer to sue the applicant or whether she had some other financial motive to sue

the applicant (I W.H. R.R. at 37, 61-63; II W.H. R.R. at 38-39).

30. The Court finds, based on the reporter's record, the evidentiary hearing testimony, and the affidavit of Lewis, that Lewis does not believe, even if he did question Ramirez about her intent to file a lawsuit, that Ramirez would have testified truthfully in response thereto; Lewis further believes that the jury did not find Ramirez credible, so he believes asking her about whether she planned to file a lawsuit against the applicant would not have changed the jury's opinion (I W.H. R.R. at 61; II W.H. R.R. at 44-46).

31. The Court finds, based on the affidavit of Maryvel Ramirez, that prior to trial Ramirez and her husband, Billy Stout, out of concern that the prosecutors were not going to be aggressive enough in their investigation and prosecution of the case, contacted Houston attorney Dick DeGuerin; that DeGuerin's office referred Ramirez and Stout to attorney Ed Hennessey.

32. The Court finds, based on the affidavit of Maryvel Ramirez, that neither Ramirez nor Stout spoke directly with Hennessey before the applicant's trial, but rather met with an assistant at Hennessey's office; that Ramirez and Stout told that representative that they were concerned that the prosecutors were not doing a good enough job and that they thought they needed more help; that Ramirez and Stout did not go to Hennessey with the intent to file a

civil lawsuit against the applicant or to get money from the applicant; that Ramirez and Stout never agreed with Hennessey or anyone from his office that they would file a civil lawsuit once the criminal trial was over; and, that Ramirez and Stout's decision to file a civil lawsuit against the applicant was not made until after the applicant's criminal case was over.

33. The Court finds, based on the based on the [sic] reporter's record, the evidentiary hearing testimony, the affidavit of Lewis, and the affidavit of Ramirez, that even if Lewis had asked Ramirez about whether she intended to file a civil lawsuit against the applicant, Ramirez would have testified at the time of trial that she did not intend to file a civil lawsuit against the applicant.

Whether counsel was ineffective for opening the door or failing to object to alleged irrelevant, prejudicial testimony.

Failing to object and opening the door to police opinion testimony that applicant was grooming his daughter for future sexual assaults.

34. The Court finds, based on the reporter's record, that Detective Heidi Ruiz testified, on direct examination that one of the steps in her investigation of the complainant's allegations was to advise Children's Protective Services that she believed the applicant's daughter should also be interviewed, because Ruiz believed the daughter was at risk for being sexually assaulted (XI R.R. at 186).

35. The Court finds, based on the writ evidentiary testimony, that Lewis believes he should have objected to Ruiz' statement as nonresponsive, yet he failed to do so (II W.H. R.R. at 58-59).

36. The Court finds, based on the reporter's record, that Ruiz' statement was relevant to the course and scope of her investigation and was not nonresponsive; the Court further finds that Ruiz' statement was not evidence that the applicant had committed an extraneous sexual assault and was not objectionable on those grounds.

37. The Court finds, based on the reporter's record, that Lewis cross-examined Ruiz extensively and demonstrated that although Ruiz expressed a belief that the applicant was grooming his daughter for a future sexual assault, Ruiz had no physical evidence nor any other evidence that the daughter had been sexually abused (XII R.R. at 40-41).

38. The Court finds, based on the reporter's record and the writ evidentiary testimony, that Lewis questioned Ruiz regarding these matters in order to show that there was no evidence to support the allegation, that Ruiz was overreaching and embellishing, and that her testimony was gratuitous, further to show and that Ruiz was just a detective who was going to do "anything and everything" the prosecutor asked her to do to convict the applicant (II W.H. R.R. at 60-61).

39. The Court finds, based on the reporter's record and the writ evidentiary testimony, that Lewis'

decision to question Ruiz about the lack of evidence that the applicant had sexually assaulted his daughter was based on reasonable trial strategy and is therefore not subject to review.

Opening the door to testimony that applicant beat women and used drugs.

40. The Court finds, based on the reporter's record, the writ evidentiary hearing testimony, and Lewis' affidavit, that Lewis cross-examined Ramirez in an attempt to establish that she had a long-standing relationship with the applicant, that she had even had an intimate relationship with the applicant, and that Ramirez now harbored a bias against the applicant and therefore had a reason to lie; that Ramirez admitted that she had known the applicant for about nineteen years, but denied that they had ever had an intimate relationship; and, that Ramirez admitted that there came a point where she no longer liked the applicant (X R.R. at 135).

41. The Court finds, based on the reporter's record, that the prosecutor sought to elicit testimony from Ramirez on re-direct examination to explain why she did not like the applicant; that Ramirez testified outside the presence of the jury that she did not like the applicant because he "cheats on his common-law wife, he's hit her, he talks bad, he's rude, he's done drugs, because he's a bad person"; and, that the trial court ruled that such testimony was

inadmissible because Lewis had not opened the door to such testimony (X R.R. at 158, 161-165).

42. The Court finds, based on the reporter's record and the writ evidentiary hearing testimony, that part of Lewis' trial strategy was to attack Ramirez' credibility to show that she had motive to fabricate the charges against the applicant; that Lewis intended to present the testimony of John Hernandez, a friend of both the families of Ramirez and the applicant, who would support Lewis' theory that Ramirez was lying about having an affair with the applicant and about having a motive to testify against him (II W.H. R.R. at 63-64, 69-71).

43. The Court finds, based on the reporter's record, that the court held a hearing outside the presence of the jury regarding Lewis' intent to present Hernandez' testimony and the effect that would have on the admissibility of Ramirez' earlier proffered testimony; that the purpose of this hearing was "to see what the Court believed would – what doors would be opened after [Lewis] presented the evidence of what Mr. Hernandez would testify to"; and, that the court ruled that if Lewis presented Hernandez' testimony, then the door would be open for Ramirez to fully explain her dislike for the applicant, as long as her testimony did not touch on any of the extraneous sexual assaults also charged against the applicant (XIV R.R. at 3-12; II W.H. R.R. at 72-73).

44. The Court finds, based on the reporter's record and the writ evidentiary hearing testimony, that Lewis carefully determined the extent of the trial court's ruling on the effect of Hernandez' testimony in terms of opening the door to extraneous offense evidence; that Lewis made the informed and reasonable strategic decision to present Hernandez' testimony; and, that Lewis believed that the benefit of Hernandez' testimony outweighed any detriment of Ramirez' testimony about why she did not like the applicant (XIV R.R. at 10-12) (II W.H. R.R. at 74-75).

45. The Court finds, based on the reporter's record and the writ evidentiary testimony, that Lewis' decision to present Hernandez' testimony and thereby open the door to limited testimony by Ramirez was based on reasonable trial strategy and is therefore not subject to review.

Failing to file a motion in limine and object to testimony that the name of applicant's record company is Dope House Records.

46. The Court finds, based on the reporter's record and the writ evidentiary hearing testimony, that the term "Dope House Records" was used only three times during the trial in the primary case, and that the State never used the name to imply that the applicant sexually abused the complainant or other children, or that the applicant used drugs or beat up women (XII R.R. at 10; XVI R.R. at 30; XVII R.R. at 57; II W.H. R.R. at 33-36).

47. The Court finds, based on the reporter's record, the writ evidentiary hearing testimony, and Lewis' affidavit, that Lewis did not believe the name "Dope House Records" was prejudicial to the applicant; that Lewis believed the term "dope" had several positive connotations in the rap and hip-hop culture; and, that Lewis was comfortable with the term and did not believe it carried a negative connotation, nor did he believe that use of the name adversely affected the applicant in the primary case (I W.H. R.R. at 75-77; II W.H. R.R. at 25-30; III W.H. R.R. at 77-78, 84).

Whether counsel was ineffective for failing to object to testimony that the complainant's grandfather, on being told by his wife that applicant molested the complainant, said that he could not take it and died of a heart attack the next day.

48. The Court finds, based on the reporter's record and the writ evidentiary hearing testimony, that Lewis sought to obtain the CAC records of therapist Julia Wulf regarding Ramirez because he believed they might contain prior inconsistent statements by Ramirez which would be useful for cross-examination; that Lewis vigorously argued a discovery motion outside the presence of the jury to obtain these records, but was unsuccessful; that Lewis cross-examined Ramirez about the reason she received therapy at the CAC; and, that Ramirez testified she received therapy related to matters arising out of the sexual assault (XVI R.R. at 7-11, 43-44; II W.H. R.R. at 46-47).

49. The Court finds, based on the reporter's record, that Ramirez testified on re-direct examination that she also saw therapist Wulf because her father had died about three months after the sexual assault; that Ramirez further testified that father died of a heart attack after learning of the sexual assault; and, that Ramirez testified that her father told her mother "he couldn't take it" (XVI R.R. at 46-47).

50. The Court finds, based on the reporter's record, that Lewis again sought discovery of the therapy records following Ramirez' re-direct examination testimony, but that request was denied (XVI R.R. at 64-65).

51. The Court finds, based on the writ evidentiary hearing testimony, that while on one hand Lewis believes that he should have objected to Ramirez' statements, he also believes he would not have objected to the testimony because he found it incredible (I W.H. R.R. at 79-80; III W.H. R.R. at 87).

52. The Court finds, based on the reporter's record and the writ evidentiary hearing testimony, that Lewis' decision to question Ramirez about the reason she received therapy at the CAC was based on reasonable trial strategy, namely, to establish a basis for obtaining the therapy records and also to inquire about prior inconsistent statements; the Court further finds that Ramirez' testimony about her father's death was relevant to the matter of why Ramirez was in therapy (II W.H. R.R. at 46-50).

53. The Court finds, based on the reporter's record, that Ramirez' testimony about the cause of her father's death was not offered for the truth of the matter asserted, namely that her father died of a heart attack upon learning of the sexual assault, but rather was offered as further reason for Ramirez receiving therapy at the CAC.

54. The Court finds, based on the writ evidentiary hearing testimony and the affidavit of Lewis, that Lewis does not believe the jury was adversely affected by Ramirez' testimony, that Lewis did not believe Ramirez was credible, and that he believes his belief was confirmed after he spoke with jurors following the trial (II W.H. R.R. at 51, 57-58).

Whether counsel was ineffective for failing to object to argument that the complainant's testimony regarding the elements of the offense was uncontradicted.

55. The Court finds, based on the ~~reporter~~'s record, that during summation the prosecutor argued that the following elements were uncontradicted: the identity of the defendant, the date of occurrence, the location of occurrence, the age of the complainant and that the complainant was not married to the defendant; the Court further finds that the prosecutor did not argue that the element of whether the applicant actually committed the act of sexual assault was uncontradicted (XVII R.R. at 47-48).

56. The Court finds, based on the writ evidentiary hearing testimony, that Lewis did not believe that the prosecutor was saying that there was no dispute that the applicant committed the offense; rather, Lewis believes the prosecutor was merely setting up, during her part of the summation, those elements which literally were not in dispute, such as the alleged place of Harris County, the alleged date, etc. (I W.H. R.R. at 82-83; W.H. R.R. at 75).

57. The Court finds, based on the reporter's record and the writ evidentiary hearing testimony, that because Lewis chose not to attack the credibility of the complainant but rather to focus on the complainant's statement that she did not know if the assault was a dream or if it really happened, Lewis had no reason to object to the prosecutor's argument; the Court further finds that Lewis believes the prosecutor's argument was consistent with his trial strategy and therefore was not objectionable (XVII R.R. at 72-78; I W.H. R.R. at 83; II W.H. R.R. at 75-79).

58. The Court finds, based on the reporter's record and the writ evidentiary hearing testimony, that Lewis' decision not to object to the prosecutor's argument was based on reasonable trial strategy and is therefore not subject to review.

Whether counsel was ineffective for inviting and failing to properly object to argument attacking him for trying to hide the truth and keep the applicant out of jail for a fee.

59. The Court finds, based on the reporter's record and the writ evidentiary hearing testimony, that Lewis argued in closing that the complainant had been manipulated during the investigation and prosecution of the case, that the prosecutors were overzealous and wanted to put another notch in their belt, and that they were on a witch hunt to convict the applicant; and, that Lewis admits these arguments were consistent with his strategy throughout trial, designed to challenge and attack the prosecutors' motives with respect to prosecuting the applicant (XVII R.R. at 72, 82-97; II W.H. R.R. at 81).

60. The Court finds, based on the reporter's record, that the prosecutor's argument was invited by Lewis' argument and made in response thereto; therefore, the argument was not objectionable.

61. The Court finds, based on the reporter's record, the writ evidentiary hearing testimony, and Lewis' affidavit, that Lewis repeatedly testified that his strategy was to cast the complainant as a "truth teller," manipulated by various State actors, especially the prosecutors, for the sole purpose of convicting the applicant at all costs; the Court further finds that Lewis' decision to pursue this defense theory was the product of a thorough investigation and reasonable trial strategy and therefore is not subject to review.

CONCLUSIONS OF LAW

Whether counsel was ineffective for failing to object to references to the complainant as the "victim" during the opening statement, testimony and summation.

1. Because the trial court did not refer to the complainant as the victim in the primary case, the holdings in *Talkington v. State*, 682 S.W.2d 674 (Tex. App. – Eastland 1984, pet. ref'd), and *Veteto v. State*, 8 S.W.3d 805, 816 (Tex. App. – Waco 2000, pet. ref'd), were inapplicable and neither controlling nor persuasive; the applicant fails to show that the trial court would have sustained an objection to the prosecutor or witness referring to the complainant as the victim or that the court would have committed reversible error in overruling the objection. *See, e.g., Johnson v. State*, 2005 WL 3065872, *5, n. 1 (Tex. App. – Houston [1st Dist.] November 15, 2005, pet. filed) (not designated for publication) (distinguishing *Veteto* and others because they involve judge's, not prosecutor's, reference to complainant as "victim" in sexual assault cases).

2. The applicant fails to show that counsel's conduct fell below an objective standard of reasonableness in failing to object to references to the complainant as the victim during the opening statement, testimony and summation; in the alternative, the applicant fails to show a reasonable probability that, but for counsel's alleged deficient conduct, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 686 (1984);

Hernandez v. State, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) (adopting the *Strickland* standard in Texas); and *Narvaiz v. State*, 840 S.W.2d 415, 434 (Tex. Crim. App. 1992) (defining the two-part *Strickland* standard).

Whether counsel was ineffective for failing to file a motion in limine and object to alleged lay and expert opinion testimony that the complainant was telling the truth about the sexual assault.

Testimony by Maryvel Ramirez.

3. The applicant fails to establish that the cited portions of the reporter's record constitute inadmissible direct opinion testimony by Ramirez on the truthfulness of the complainant; therefore, the applicant fails to show that counsel's conduct was deficient in failing to object to these statements. *McFarland v. State*, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992) (holding that failure to object to admissible evidence does not constitute ineffective assistance); *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996) (holding that applicant must show that trial judge would have committed error in overruling objection to show ineffective assistance of counsel).

4. Further, assuming *arguendo* that Ramirez' statements were inadmissible opinion testimony, the applicant fails to show a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686.

Testimony of Officer David Milligan.

5. The applicant fails to establish that the cited testimony by Officer David Milligan constitutes inadmissible direct opinion testimony on the truthfulness of the complainant; therefore, the applicant fails to show that counsel's conduct was deficient in failing to object to this statement. *McFarland*, 845 S.W.2d at 846; *Vaughn*, 931 S.W.2d at 566.

6. Further, assuming *arguendo* that Milligan's statement was inadmissible opinion testimony, the applicant fails to show a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686.

Testimony of John Hernandez.

7. The applicant fails to establish that the cited testimony by John Hernandez constitutes inadmissible direct opinion testimony on the truthfulness of the complainant; therefore, the applicant fails to show that counsel's conduct was deficient in failing to object to this statement. *McFarland*, 845 S.W.2d at 846; *Vaughn*, 931 S.W.2d at 566.

8. Further, assuming *arguendo* that Hernandez' statement was inadmissible opinion testimony, the applicant fails to show a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686.

Testimony of Heidi Ruiz.

9. The applicant fails to establish that the cited testimony by Heidi Ruiz constitutes inadmissible direct opinion testimony on the truthfulness of the complainant; therefore, the applicant fails to show that counsel's conduct was deficient in failing to object to this statement. *McFarland*, 845 S.W.2d at 846; *Vaughn*, 931 S.W.2d at 566.

10. Further, assuming *arguendo* that Ruiz' statement was inadmissible opinion testimony, the applicant fails to show a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686.

Testimony of Nicoya McLemore.

11. The applicant fails to establish that the cited testimony by Nicoya McLemore constitutes inadmissible direct opinion testimony on the truthfulness of the complainant; therefore, the applicant fails to show that counsel's conduct was deficient in failing to object to this statement. *McFarland*, 845 S.W.2d at 846; *Vaughn*, 931 S.W.2d at 566.

12. Further, assuming *arguendo* that McLemore's statement was inadmissible opinion testimony, the applicant fails to show a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686.

Testimony of Cynthia Womack.

13. The applicant fails to establish that the cited testimony by Cynthia Womack constitutes inadmissible direct opinion testimony on the truthfulness of the complainant; therefore, the applicant fails to show that counsel's conduct was deficient in failing to object to this statement. *McFarland*, 845 S.W.2d at 846; *Vaughn*, 931 S.W.2d at 566.

14. Further, assuming *arguendo* that Womack's statement was inadmissible opinion testimony, the applicant fails to show a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686.

Testimony of Susan Szczygielski.

15. The applicant fails to establish that the cited testimony by Susan Szczygielski constitutes inadmissible direct opinion testimony on the truthfulness of the complainant; therefore, the applicant fails to show that counsel's conduct was deficient in failing to object to this statement. *McFarland*, 845 S.W.2d at 846; *Vaughn*, 931 S.W.2d at 566.

16. Further, assuming *arguendo* that Szczygielski's statements were inadmissible opinion testimony, the applicant fails to show a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686.

Whether counsel was ineffective for failing to question the complainant's mother about whether she intended to file a civil lawsuit against applicant.

17. Because the applicant has failed to show that at the time of trial in the primary case Ramirez intended to file a civil lawsuit against the applicant, the applicant fails to show that counsel's conduct fell below an objective standard of reasonableness in failing to question Ramirez in this manner; furthermore, the applicant fails to show a reasonable probability that, but for counsel's failure to question Ramirez about whether she intended to file a civil lawsuit against the applicant, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686.

Whether counsel was ineffective for opening the door or failing to object to alleged irrelevant, prejudicial testimony.

Failing to object and opening the door to police opinion testimony that applicant was grooming his daughter for future sexual assaults.

18. The applicant fails to show that Ruiz' statement that she referred the applicant's daughter to Child Protective Services was improper testimony that the applicant had committed an extraneous sexual assault; therefore, the applicant fails to show that counsel's conduct was deficient in failing to object to this testimony. *McFarland*, 845 S.W.2d at 846; *Vaughn*, 931 S.W.2d at 566.

19. Lewis' decision to elicit from Ruiz on cross-examination testimony that Ruiz had no evidentiary basis for believing that the applicant's daughter had been sexually abused was reasonable trial strategy, designed to convey to the jury that Ruiz was biased and overzealous against the applicant, and therefore not credible; because Lewis' decision was based on a thorough investigation and was reasonable trial strategy, it is therefore not subject to review; therefore, the applicant fails to show that counsel's conduct was deficient in this regard. *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003).

20. The applicant fails to show that he was harmed by Lewis' decision to cross-examine Ruiz because Lewis vigorously cross-examined Ruiz about the absence of a factual basis for her belief, and Lewis further extensively attacked her credibility and motive during his closing, arguing that Ruiz and the other State's witnesses demonstrated a deliberate pattern of overreaching and embellishing; the applicant fails to show that the jury relied on Ruiz' testimony about grooming in determining the applicant's guilt, and therefore fails to show a reasonable probability that, but for Lewis' conduct, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686.

Opening the door to testimony that applicant beat women and used drugs.

21. Lewis' decision to present Hernandez' testimony and thereby open the door to limited testimony by Ramirez was based on reasonable trial strategy and is therefore not subject to review; therefore, the applicant fails to show that counsel's conduct was deficient in this regard. *Wiggins*, 539 U.S. at 521-22.

22. In the alternative, the applicant fails to show a reasonable probability that, but for counsel's decision to present Hernandez' testimony, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686.

Failing to file a motion in limine and object to testimony that the name of applicant's record company is Dope House Records.

23. The applicant fails to establish that counsel had a valid basis for objecting to use of the name "Dope House Records" at trial in the primary case; therefore, the applicant fails to show that counsel's conduct was deficient in failing to object to admission of testimony relating to the name of the applicant's business. *McFarland*, 845 S.W.2d at 846; *Vaughn*, 931 S.W.2d at 566.

24. Because the applicant fails to show that the State used the name "Dope House Records" to imply that the applicant had committed the offense in the

primary case or that he had committed any extraneous offenses or that he was of bad character, the applicant fails to show a reasonable probability that, but for counsel's failure to object to use of the term, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686.

Whether counsel was ineffective for failing to object to testimony that the complainant's grandfather, on being told by his wife that applicant molested the complainant, said that he could not take it and died of a heart attack the next day.

25. Counsel's decision to question Ramirez about the reasons for her therapy treatments at the CAC was based on reasonable trial strategy, both to establish a basis for discovering the CAC therapy records and to determine whether there were any prior inconsistent statements by Ramirez; therefore, the decision is not subject to review. *Wiggins*, 539 U.S. at 521-22.

26. The applicant fails to show that he was harmed by counsel's failure to object to Ramirez' testimony because such testimony was relevant to show why Ramirez received therapy at the CAC and was therefore admissible. *McFarland*, 845 S.W.2d at 846; *Vaughn*, 931 S.W.2d at 566.

27. The applicant further fails to show that he was harmed by counsel's failure to object to Ramirez' testimony because such testimony was not inadmissible hearsay; it was not offered for the truth of the

matter asserted, but rather was offered to show why Ramirez received therapy at the CAC and was therefore admissible. *McFarland*, 845 S.W.2d at 846; *Vaughn*, 931 S.W.2d at 566.

28. In the alternative, the applicant further fails to show that he was harmed because he fails to show that the jury believed Ramirez' testimony that her father died of a heart attack upon learning of the sexual assault; therefore, the applicant fails to show that, but for counsel's failure to object to this testimony, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686.

Whether counsel was ineffective for failing to object to argument that the complainant's testimony regarding the elements of the offense was uncontradicted.

29. Because the prosecutor's argument that most, not all, of the elements of the offense were uncontradicted was consistent with Lewis' decision not to challenge the credibility of the complainant but rather to focus on the complainant's statement that she did not know if the assault was a dream or if it really happened, the applicant fails to show that counsel's conduct was deficient for failing to object.

30. Lewis' decision not to object to the prosecutor's argument because it was consistent with his trial strategy was based on reasonable trial strategy and is therefore not subject to review; therefore, the

applicant fails to show that counsel's conduct was deficient in this regard. *Wiggins*, 539 U.S. at 521-22.

Whether counsel was ineffective for inviting and failing to properly object to argument attacking him for trying to hide the truth and keep the applicant out of jail for a fee.

31. The prosecutor's argument that Lewis was trying to hide the truth and keep the applicant out of jail for a fee was made in response to Lewis' argument that the prosecutors were overzealous, overreaching, and on a witch hunt and therefore was within the bounds of permissible jury argument. *Sterling v. State*, 840 S.W.2d 114, 120 (Tex. Crim. App. 1992); *Staley v. State*, 887 S.W.2d 885, 895 (Tex. Crim. App. 1994) (the four categories of permissible jury argument are: (a) summation of evidence, (b) reasonable deductions from evidence, (c) response to opponent's argument, and (d) pleas for law enforcement).

32. Lewis' argument that the prosecutors were overzealous, overreaching, and on a witch-hunt was consistent with his overall defense theory, was the product of a thorough investigation and reasonable trial strategy, and therefore is not subject to review. *Wiggins*, 539 U.S. at 521-22.

33. In the alternative, the applicant fails to show a reasonable probability that, but for counsel's decision to argue as he did, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686.

34. The applicant fails to show that counsel's strategic decisions during the course of trial in the primary case were unreasonable or that, by a preponderance of the evidence, there is a reasonable probability that the result of the proceeding would have been different but for counsel's conduct.

35. The totality of the representation afforded the applicant was sufficient to protect his right to reasonably effective assistance of counsel in the primary case.

36. In all things, the Applicant has failed to demonstrate that his conviction was improperly obtained.

Accordingly, the Court recommends to the Texas Court of Criminal Appeals that relief be denied.

ORDER

THE CLERK IS ORDERED to prepare a transcript of all papers in cause number 908426-A and transmit same to the Court of Criminal Appeals as provided by TEX. CODE CRIM. PROC. ANN. art. 11.07 § 3 (Vernon Supp. 2005). The transcript shall include certified copies of the following documents:

A. the application for writ of habeas corpus, together with all attachments;

B. the Respondent's original answer and first supplemental answer;

C. the affidavits and exhibits filed herein;

D. the Court's order;

E. the appellate record in cause number 908426;

F. the reporter's record of the writ evidentiary hearing in cause number 908426-A;

G. the Court's Findings of Fact and Conclusions of Law; and

H. the Respondent's Proposed Findings of Fact and Conclusions of Law and the Applicant's Proposed Findings of Fact and Conclusions of Law.

THE CLERK is further ORDERED to send a copy of this order to the Applicant and to the State.

By the following signature, the Court adopts the Respondent's Proposed Findings of Fact, Conclusions of Law and Order.

Signed on this 25 day of May, 2006.

/s/ Mary Kent Ellis
JUDGE PRESIDING